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IN THE

Supreme Court of the United States

October Term, 1960.

No. 798

MONTE G. MASON and JEANNE ROSE MASON,
Petitioners,

vs.

THE STATE OF CALIFORNIA,
Respondent.

Petition for Writ of Certiorari to the District Court of Appeal, State of California, in and for the Second Appellate District, Division One.

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THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the District Court of Appeal, State of California, in and for the Second Appellate District, Division One.

To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners, Monte G. Mason and Jeanne Rose Mason, respectfully show to this Honorable Court:

Opinion Below.

The opinion of the California Reviewing Court involves some 58 pages of printing and is reported as *People v. Mason,* 184 A. C. A. 342, decided September 2, 1960. A Petition for Rehearing was denied, and a Petition for Hearing in the Supreme Court was likewise denied without an opinion filed. A Motion for extension of time sets out the date that the Rehearing was denied and the case and the volume that it was reported in the Advance Sheet.

Summary and Short Statement of the Matter Involved.

By an Indictment in the Superior Court of the State of California, in and for the County of Los Angeles, the defendants and appellants, Monte G. Mason and Jeanne R. Mason, and one Clyde D. Moslander, Jr., were charged with criminal conspiracy in violation of Section 182, Subd. 4 of the Penal Code to commit Grand Theft, Section 487, Subd. 1, of the Penal Code, and to violate the Corporate Securities Law (Sec. 25009, Subd. "a", Sec. 26104, Subd. "a", of the Corp. Code). These defendants and appellants were charged with one, Clyde D. Moslander, Jr., but proceeded to trial without Moslander. After a trial by a jury, the following was the result. The case was given to the jury on December 11, 1958, and returned a verdict on December 15, 1958, at about 3:45 p.m. of that day. The verdict of the jury was as follows: Count One, Conspiracy, Monte Glenwood Mason, Guilty; Jeanne Rose Mason, Guilty of Count One, both charging conspiracy. Count Two, Monte Glenwood Mason, Not Guilty as to Count Two; Jeanne Rose Mason, Not Guilty as to Count Two; Jeanne Rose Mason, Not Guilty as to Count Three; Monte Glenwood Mason, Guilty of violation of Corporate Securities Law, Count Five; Jeanne Rose Mason, Guilty, Corporate Securities Law, Count Five; Monte Glenwood Mason, Guilty, Corporate Securities Law, Count Seven; Jeanne Rose Mason, Guilty, Corporate Securities Law, Count Seven; Monte Glenwood Mason, Guilty, Corporate Securities Law, Count

Eight; Jeanne Rose Mason, Guilty, Corporate Securities Law, Count Eight; Monte Glenwood Mason, Guilty, Corporate Securities Law, Count Nine; Jeanne Rose Mason, Guilty, Corporate Securities Law, Count Nine; Monte Glenwood Mason, Guilty, Corporate Securities Law, Count Eleven; Jeanne Rose Mason, Guilty, Corporate Securities Law, Count Eleven; Monte Glenwood Mason, Guilty, Grand Theft, Count Fourteen; Jeanne Rose Mason, Guilty, Grand Theft, violation of Section 487.1 Penal Code, Count Fourteen; Monte Glenwood Mason, Guilty, Corporate Securities Law, Count Fifteen; Jeanne Rose Mason, Guilty, Corporate Securities Law, Count Fifteen; Monte Glenwood Mason, Guilty, Corporate Securities Law, Count Sixteen; Jeanne Rose Mason, Guilty, Corporate Securities Law, Count Sixteen. The Court declares a mistrial on Counts Four, Six, Twelve, Thirteen and Nineteen. The jury was poled as to all guilty verdicts and to each the response was unanimously affirmative. The verdicts were signed, and the unsigned verdicts were filed. The verdicts appear at the Clerk's Transcript, pages 64 to 67. A memorandum of points and authorities in support of a motion for new trial and motion in arrest of judgment appears at pages 305 to 334, inclusive, of the Clerk's Transcript. Upon the hearing of the motion for new trial on February 24, 1959, the motion for new trial as to Monte G. Mason was denied. A motion to strike certain portions of the probation officer's report was denied. On Counts

One, Five, Seven, Eight, Nine, Eleven, Fourteen, Fifteen and Sixteen probation was denied, and the defendant was sentenced to the State Prison for the term prescribed by law on said Counts; sentences as to Counts One, Five and Fourteen are ordered to run consecutively; sentences as to Counts Seven, Eight, Nine, Eleven, Fifteen and Sixteen are ordered to run concurrently with each other. Counts Four, Six, Ten, Twelve, Thirteen and Nineteen were placed off calendar [Clk. Tr. p. 335]. As to defendant and appellant Jeanne R. Mason, motion for new trial was denied; motion to strike portions of the probation officer's report was denied. On Counts One, Five, Seven, Eight, Nine, Eleven, Fourteen, Fifteen and Sixteen probation was denied, and the defendant was sentenced to the California Institution for Women for the term prescribed by law on said counts; sentences as to Counts One, Five, Seven, Eight, Nine, Eleven, Fourteen, Fifteen, and Sixteen are ordered to run concurrently with each other; Counts Four, Six, Ten, Twelve, Thirteen and Nineteen were placed off calendar [Clk. Tr. p. 336].

Subsequently notice of appeal was duly filed, and the matter is now before this Court pursuant to such appeal [Clk. Tr. pp. 340-342].

On appeal, the Federal question was raised that the Indictment set forth acts constituting a public offense with sufficient clarity or reasonable notice to provide an opportunity to prepare and present a defense, in violation of the due process clause of the Fourteenth

Amendment; that the Trial Court's failure to properly adjudicate a motion in arrest of judgment was a denial of the due process of law clause; that the Petitioners were denied a fair and impartial trial by the prosecutor's prejudicial misconduct; in violation of the due process law clause of the Fourteenth Amendment; that the judgments are not supported by any evidence of guilt, contrary to and in violation of the due process of law clause of the Fourteenth Amendment. The District Court of Appeal of the State of California, in and for the Second Appellate District, Division One, ruled adversely to the petitioners in actions on appeal.

Basis of Jurisdiction.

The jurisdiction of this Honorable Court is invoked under the provisions of the State Court's erroneous decision of the Federal question especially set up and relied upon; that all available and adequate State Court remedies have been exhausted to bring the case within the provisions of Rule 22(1) of this Honorable Court; 28 U. S. C. 1257(3) of the Judicial Code of the United States; the Fourteenth Amendment to the Constitution of the United States, and the Acts of Congress made and provided in such case, and this Honorable Court's Order extending the time to March 10, 1961, for the filing of the Petition for the Writ of Certiorari.

Federal Questions Presented.

I.

DID THE INDICTMENT FAIL TO SET FORTH ACTS CONSTITUTING A PUBLIC OFFENSE WITH SUFFICIENT CLARITY FOR REASONABLE NOTICE TO PROVIDE AN OPPORTUNITY TO PREPARE AND PRESENT A DEFENSE IN VIOLATION OF THE DUE PROCESS OF LAW CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

II.

DID THE SUPERIOR COURT, IN FAILING TO PROPERLY ADJUDICATE MOTION IN ARREST OF JUDGMENT, DENY PROCEDURAL DUE PROCESS OF LAW IN THE PETITIONERS?

III.

DID THE PROSECUTOR'S MISCONDUCT DURING THE COURSE OF THE TRIAL DEPRIVE THE PETITIONERS OF A FAIR AND IMPARTIAL TRIAL, IN VIOLATION OF THE DUE PROCESS OF LAW CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION?

IV.

ARE THE JUDGMENTS OF THE STATE COURT NOT SUPPORTED BY ANY EVIDENCE OF GUILT, IN VIOLATION OF THE DUE PROCESS LAW CLAUSE OF THE FOURTEENTH AMENDMENT?

The Manner in Which the Federal Questions Were Raised.

The Federal questions were first raised in the Trial Court on motion for new trial and in arrest of judgment, and more specifically in the Petitioner's Opening Brief on appeal in the State Court, at page 159 through page 166. See Record.

Reasons Relied on for Allowance of the Writ.

The California Appellate Court and the Supreme Court of California have decided an important question of Federal Law constituting the law which had not been, but should be, settled by this Honorable Court. Did the State Court proceedings adequately provide the petitioners with procedural due process of law and was the prosecutor's misconduct such as to deprive them of a fair and impartial trial within the meaning of the due process of law clause. It is elementary law under our constitutional system that the accused is entitled to notice of the specific acts constituting the offense with sufficient clarity so that he may prepare and present a defense in a fair and impartial trial.

The Appellate Court of California and the Supreme Court of California have decided a Federal question of substance and have decided it in a way probably not in accordance with applicable decisions of the Supreme Court of the United States. It is contended that these reasons call for the exercise of this Honorable Court's jurisdiction to review the State Court judgment by Writ of Certiorari.

ARGUMENT.

I.

Did the Indictment Fail to Set Forth Acts Constituting a Public Offense With Sufficient Clarity for Reasonable Notice to Provide an Opportunity to Prepare and Present a Defense in Violation of the Due Process of Law Clause of the Fourteenth Amendment to the Constitution of the United States?

The Reviewing Court devotes some five pages of the printed opinion (*People v. Mason*, 184 A. C. A. 342, at 377 through 382) attempting to explain that there was no violation of procedural due process of law. The Court cites Section 952 of the Penal Code which provides that in charging an offense each count shall contain and shall be sufficient if it contains in substance a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary concise language with any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused, charging that it shall be sufficient to allege that the defendant unlawfully took the labor property of another.

The Court then goes on to hold that these provisions are permissible and discretionary and not mandatory; that they do not direct what must be alleged in a plead-

ing, but indicate rather broadly the form a pleading may follow; that notice of the offense to the accused constitutes notice of the offense to the accused mention in the statute constitutes a clear manifestation of legislative intent that even less than a pleading of offense in the language of the statute would be sufficient so long as the accused is given the aforementioned notice.

The Court then quotes from Fricke's "California Criminal Procedure," at pages 102-104, Fifth Edition, where it is pointed out that a defendant is given notice of the essential acts constituting the offense from the transcript of the evidence taken before the Grand Jury or before the magistrate at the preliminary examination.

In replying to the appellant's contention that Count One of the Indictment failed to allege a specific intent and the complaint that the grand theft count of the indictment is defective and that it fails to charge an attempt to deprive the owner permanently of his property was answered by the provisions of Section 952 of the Penal Code, which provides:

> "It shall be sufficient to allege that the defendant unlawfully took the property of another."

In connection with the grand theft count, the Court cites the recent case of *People v. Ashley*, 42 Cal. 2d 246, at 258, decided by the Supreme Court, wherein it was held that the law was settled in this State that an allegation of unlawful theft of property was sufficient.

II.

The Indictment Fails to Comply With the Procedural Due Process of Law Clause of the Fourteenth Amendment to the Constitution of the United States, in That It Does Not Give the Accused Notice of the Specific Acts or Omissions Constituting a Public Offense With Sufficient Clarity Upon Which to Prepare and Present a Defense.

Count One of the Indictment attempts to charge the crime of criminal conspiracy under Section 182, Subdivision 4, of the Penal Code of California, in that the defendant and others conspired to commit the offense of violation of Section 487, Subdivision 1, of the Penal Code, and Section 25009, Subdivision (a), and Section 26104, Subdivision (a), of the Corporations Code of California, felonies, commencing on or about October 9, 1948, and continuing up to the filing of the Indictment. No victim is alleged in the charging part of the Indictment. Eighteen overt acts are alleged in Count One. (The judgment part of the indictment is set forth under Footnote No. 22, and the overt acts are set forth under Footnote No. 4, in the printed decision reported as *People v. Mason*, 184 A. C. A. pp. 342, 351, 352 and 377.)

The State Reviewing Court holds, at page 377 of the printed opinion, that Section 952 of the Penal Code, providing that the charging part of the Indictment may be in the words of the enactment describing the offense or declaring the matter to be above the offense, or in any words sufficient to give the accused notice of the offense of which he is accused, is sufficient and in the charging of theft, it is sufficient to allege that the de-

fendant unlawfully took the labor or property of another. The Court says that these provisions are permissible and discretionary, but not mandatory, for the statute does not provide or direct what must be alleged in a pleading, but indicates rather broadly a form of pleading that may be followed; that the use of the words "give the accused notice of the offense of which he is accused" constitutes a clear manifestation of legislative intent that even less than a pleading of the offense in the language of the statute would be sufficient so long as the accused is given the aforementioned notice, and the Court then cites Judge Fricke's Fifth Edition of California Criminal Procedure, at pages 102, 104.

It is the contention of the petitioners here that the State Court may not invoke and hold supreme Fricke's Fifth Edition of California Criminal Procedure as against the authorities cited in the Opening Brief on Appeal on pages 81 through 101, among which are *In re Oliver*, 333 U. S. 217; *United States v. Hess*, 124 U. S. 516, at 486, 487; *Cole v. Arkansas*, 333 U. S. 196, at 201; *Todd v. United States*, 158 U. S. 278.

The California Reviewing Court's holding in the present case on what constitutes sufficient notice to an accused in the Indictment is diametrically opposed to this Honorable Court's determination in the case of *United States v. Hess*, 124 U. S. 516, at pp. 486, 487, wherein it was held:

> "The statute upon which the indictment is founded only describes the general nature of the offense prohibited; and the indictment, in repeating its language without averments, disclosing the particulars of the alleged offense, states no mat-

ters upon which issue could be formed for submission to a jury. The general and, with few exceptions, of which the present case is not one, the universal rule on this subject is, that all the material facts and circumstances embraced in the definition of the offense must be stated or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly, and not inferentially or by way of recital. * * *

"The doctrine invoked by the solicitor-general, that it is sufficient, is an indictment upon a statute, to set forth the offense in the words of the statute, does not meet the difficulty here. Undoubtedly the language of the statute may be used in the general description of an offense; but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged."

In *Cole v. Arkansas,* 333 U. S. 196, at p. 201, this Honorable Court said:

"No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding *in all courts, state or federal.*" (Emphasis added.)

In the *Cole* case, *supra*, it is the mandate of this Honorable Court to all State and Federal Courts that procedural due process of law shall be complied with in giving the accused notice of the specific charge with sufficient clarity upon which a defense may be prepared and presented.

In the case of *In re Oliver, supra*, it was held that a person's right to reasonable notice of the charge against him along with other guaranteed rights are basic in our system of jurisprudence. And in the case of *Todd v. United States, supra*, the Court held that an indictment cannot by intendment or supplying a deficiency, extend its arm to aid in obtaining a conviction or supplying, by judicial fiat, some instrument which will aid in obtaining or upholding a judgment of conviction.

In the concluding paragraph from Fricke's "California Criminal Procedure," at page 104, cited by the Reviewing Court, quoting from *People v. Roberts*, 40 Cal. 2d 483, wherein it was held:

> "Notice of the particular circumstances of the offense is given not by detailed pleadings but by the transcript of the evidence before the committing magistrate or the Grand Jury."

It is the contention of the petitioners here that such notice by transcripts of the proceedings before the committing magistrate or of the Grand Jury is not sufficient notice to an accused of the public offense or offenses upon which he must stand trial, for the accused has no way of knowing what particular facts or circumstances in such record will be claimed to be criminal by the prosecutor, and certainly the defendant is not required to pick over such a record in order to determine

criminal accusation against himself. Under California law, Penal Code Section 1004, setting forth the grounds of demurrer, such a demurrer may be made only upon the face of the accusatory pleading, and the accusatory pleading is either the indictment or information, and may only be based on the grounds that it does not comply with Sections 950, 952, or Section 951 of the Penal Code, in the case of either the indictment or information, or that the facts stated do not constitute a public offense. As Section 948 of the Penal Code provides that all forms of and rules of pleadings are to be found in the Penal Code, and that the rules by which the sufficiency of the pleading is to be determined, are those prescribed by the Penal Code, and that the first pleading on the part of The People is by indictment, information, or accusatory pleading in the Superior Court, the transcript of the testimony before the committing magistrate or the Grand Jury, is not the part of the record of the Superior Court.

Section 950 of the California Penal Code provides that the defendant shall be given, in the indictment or information or accusatory pleading, "a statement of the public offense or offenses charged therein." Section 951 of the Penal Code provides for a short form of indictment or information, giving the title of the court, the name of the defendant, whether it be felony or misdemeanor, giving the name of the specific crime, on or about a certain date, in the County and State, and must set forth and insert a statement of the act or omission constituting the offense.

Section 952 of the California Penal Code provides that in charging a public offense in an accusatory pleading it shall be sufficient if the accused is given notice

of the offense in such a statement as may be made in ordinary and concise language without any technical averments or any allegations of matters not essential to be proved. The very language used in Section 952, *supra,* is diametrically opposed to the language used in *United States v. Hess, supra,* (124 U. S. 516, at pp. 486, 487), and therefore is unconstitutional for providing less than what is required by procedural due process of law under the Fourteenth Amendment to the Constitution of the United States.

Under Section 1005 of the Penal Code, it is provided that the demurrer must distinctly specify the grounds of objection to "the accusatory pleading or it must be disregarded." Here the legislature is specific in the limitation of a demurrer to the accusatory pleading and makes no mention of the transcript of the evidence taken either before the committing magistrate or the Grand Jury.

Section 1012 of the Penal Code provides that when any of the objections mentioned in Section 1004 appear on the face of the accusatory pleading, no mention made of the transcript of the evidence before the committing magistrate or Grand Jury, it can be taken only by demurrer, and failure to so take it shall be deemed a waiver thereof.

The California Reviewing Court also holds erroneously that where a permit is required to sell a security and an essential element of the offense is the sale or offering for sale of a security without the permit, the exception is descriptive and need not be alleged in the indictment.

The Reviewing Court failed to look to the statute, Section 26104 of the Corporations Code, or in designat-

ing a violation of the law, the legislature provides that, "who does any of the following *acts* and is guilty of a public offense," the following subdivisions then provide the specific type of acts constituting the offense, such as the sale or offering for sale of a security of a corporation without a permit, or the sale of a personally owned security without a permit, with the proceeds of the sale reverting to the benefit of the corporation. It will be noticed at once that not one of these essential elements are set forth in the indictment, either in the conspiracy charge or in the counts charging a violation of the State Corporations Code. The Reviewing Court states that it was perfectly all right for count fourteen of the indictment to merely allege that the defendants took the personal property of another, without stating more, for Section 952 of the Penal Code provides that in "charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another."

The Reviewing Court then, disregarding the applicable decisions of this Honorable Court in its mandate that the accused shall receive notice of the specific acts constituting the offense, says that it is a settled law of this State that an allegation of an unlawful taking, as in the case at Bar, is sufficient, citing *People v. Ashley*, 42 Cal. 2d 246, 258; and *People v. Corenevsky*, 124 Cal. App. 2d 19, at p. 23.

Under the authorities heretofore cited interpreting the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, the State Court's decision erroneously deciding the Federal question was necessary to the jurisdiction of this Honorable Court for the determination of the cause.

What was said by this Honorable Court in reversing the judgment of conviction in *Rochin v. California*, 342 U. S. 165, is appropriate at this time:

> "However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking people even toward those charged with the most heinous offenses.'"

III.

The State Court's Failure or Neglect to Pass Upon a Motion of Arrest of Judgment Is a Denial of Procedural Due Process of Law in Violation of the Fourteenth Amendment to the Constitution of the United States.

The opinion of the Reviewing Court, at pages 382 and 383, (*People v. Mason*, 184, A. C. A.), concedes that defense counsel made an oral motion in arrest of judgment upon the return of the verdicts of the jury. Also, that defense counsel filed a memorandum of points and authorities in support of the motion for a new trial and motion in arrest of judgment.

The trial record shows that upon return of the verdicts of the jury, and after the oral motions for a new trial and arrest of judgment, the Court made the following statement:

> "The Court: You do not have to. It is arrested until after motion for a new trial, until I pass sentence depending on the outcome of the motion, Mr.

> Strong. So, make a motion for your new trial on all these statutory grounds." [Rep. Tr. p. 3165, line 17, to p. 3166, line 7.]

The trial record shows that the Court made no further order in reference to the motion in arrest of judgment, and the Reviewing Court on appeal erroneously held that the Trial Court evidently denied the motion in arrest of judgment when it denied the motion for a new trial in referring to such motions opposed the motion for a new trial and the re-submission of the matter to the Probation Department for re-referral, and then accuses present counsel of mistake in relation to the Court's order on said motions, stating that the trial counsel was not referring to the motion in arrest of judgment in objection to the pronouncement of judgment, but rather was objecting to the re-referral of the case to the Probation Officer.

It is difficult to understand how the Reviewing Court could come to the conclusion that the Court in deciding two motions, motion for a new trial and motion for re-referral to the Probation Department, can also include language that the motion in arrest of judgment was also denied, when the record would indicate to the contrary. A motion in arrest of judgment means that once the Trial Court grants the motion in arrest of judgment, as the Trial Court obviously did in the present case, at least conditionally, the Court has no furhter jurisdiction to proceed to and pronounce judgment, for Section 1187 of the California Penal Code provides that:

> "The effect of an order arresting judgment, in a Superior Court, is to place the defendant in the same situation in which he was immediately be-

fore the indictment was found or information filed. In any other Court the effect is to place the defendant in the situation in which he was before the trial was had."

Section 1185 of the California Penal Code provides that a motion in arrest of judgment may be made by the accused in order that no judgment be rendered on the grounds of any of the defects in the accusatory pleadings mentioned in Section 1004, unless the objection has been waived by a failure to demurrer, and must be made and determined before the judgment is pronounced.

Section 1191 of the California Penal Code provides that a court may extend the time for pronouncement of judgment beyond the statutory period if in order to determine a motion in arrest of judgment.

Section 1201 of the California Penal Code provides which causes may be shown against judgment, one of which is motion in arrest of judgment, and Section 1202 of the same Code provides that if the Court does not pronounce judgment as provided by Section 1192 of the same Code, within the time fixed by Section 1191 of the Code, then the defendant shall be entitled to a new trial, and if the Court shall refuse to hear defendant's motion for a new trial or motion in arrest of judgment within the time fixed for the pronouncement of judgment, then the defendant shall be entitled and it is mandatory that the Trial Court grant him a new trial.

In the present case, the Reviewing Court attempts to overcome this procedural due process defect by stating in its opinion, at page 383, of 184 A. C. A., that

it seems clear that the record is consistent with the Trial Court having passed upon and having denied the motion (*i.e.*, both for a new trial and in arrest of judgment), citing *People v. Wissenfeld*, 36 Cal. 2d 758, at p. 767, wherein the Court said:

> "All intentments and presumptions not contradicted by or inconsistent with the record or in favor of the regularity of the proceedings in the Court below".

In the case of *People v. Ralph*, 24 Cal. 2d 575, at 581, and in the latter case of *In re Tarter*, 52 A. C. 261, at 267, the Supreme Court of California, in reference to presumption, said:

> "When language which is reasonably susceptible of two constructions is used in a penal law, ordinarily that construction which is more favorable to the offender will be adopted. The defendant is entitled to the benefit of every reasonable doubt, whether it arises out of the question of fact, or as to the true interpretation of words or construction of the language used in a statute." (Authorities.)

In the present case the record is clear that the Court did in fact conditionally arrest the judgment and lost jurisdiction to proceed in the matter to judgment and sentence.

In the case of *In re Rothrock*, 14 Cal. 2d 34, the Supreme Court of California, after judgment of conviction was affirmed on direct appeal, upon motion of

the appellant, recalled and corrected the remittitur, and although at the time of judgment the appellant was asked if there was any cause why judgment should not be pronounced and the Court received a negative answer, nevertheless the Supreme Court of California held, at page 41, that:

> "So, in the present case, the motion for new trial was duly made; the Court did not pass thereon within the time provided by Section 1191 of the Penal Code; petitioner, having been prejudiced by the failure to have the motion determined, is now entitled to a new trial under Section 1202 of the said Code."

In the case of *People v. Prudencio,* 93 Cal. App. 241, the jury returned a verdict of murder in the first degree; the Trial Court reduced the offense to murder in the second degree, without determining a motion for new trial, and the Court there held, at pages 246, 247, that failure, neglect, or refusal on the part of the Trial Judge to perform a duty thus imposed upon him by law, whether resulting from inadvertence or error, can not operate to the prejudice of such person and thereby deprive him of the right to a new trial, if otherwise he is legally entitled to the same.

As all forms and rules of pleading are to be found in the Penal Code of California, upon which the sufficiency of pleadings is to be determined, and as all presumptions must be in favor of the defendants prior to judgment, and that the record conclusively shows that

the Court conditionally arrested judgment, there can be no presumption of regularity of the proceedings, for the Trial Court lost jurisdiction to proceed to judgment and sentence in the present case, for motion in arrest of judgment is a matter of pleading in the form of the delayed demurrer, supplementing Sections 1004 and 1012 of the Penal Code of California.

The motion in arrest of judgment was made and based upon the insufficiency of the pleadings as urged in Point I of this petition. In the case of *People v. Titus*, 85 Cal. App. 413, at 416, the Court held that a defendant may waive formality established for his protection, but that which is essential to a valid judgment. In the case of *In re Garrity*, 97 Cal. App. 2d 372, the Court held:

> "The lack of jurisdiction may not be waived or be stipulated."

The procedural due process rule to be applied here, it is respectfully urged, requires the State Court must give full force and effect to the mandatory procedural mandate of the statutes of the State facilitating the dominant requirements of the procedural due process clause of the Fourteenth Amendment to the Constitution of the United States, as held in *Rochin v. California, supra.*

IV.

The Prosecutor's Prejudicial Misconduct Throughout the Trial Deprived the Petitioners of a Fair and Impartial Trial Within the Meaning of the Due Process of Law Clause of the Fourteenth Amendment to the Constitution of the United States.

The California Reviewing Court, treating the question of misconduct of the prosecutor, devoted over five and a half pages to the subject, attempting to explain away the prosecutor's calculated misconduct.

The Reviewing Court sets out just a portion of the claimed misconduct of the prosecutor where defense counsel was accused by the prosecutor of the most malicious, vicious, deliberate attempt to mislead the jury, of misstating the evidence and misquoting the prosecuting attorney's argument, and the Reviewing Court holds, on page 385 of 184 A. C. A., that the failure of counsel to interpose an objection to the prosecutor's remarks did not render the remarks prejudicial to the accused. Yet, in the very same paragraph, the Court refers to defense counsel taking exception to the purported admissions by him of a technical violation of the law and the Trial Judge agreeing with defense counsel and expressly admonished the jury to "disregard that statement," and defense counsel's statement in his closing argument to the jury that the law was in fact "unclear and technical"; that circumstances militating against any claimed prejudice, so the Reviewing Court

held, that remarks of a similar nature have been exchanged.

The Court then went on to state that defense counsel's statements in his closing argument to the jury that the prosecuting attorney had presented matters which may have been deliberately calculated to confuse people had insulted the intelligence of everybody who sees and listens to the evidence, and that the prosecution was trying to befuddle the jury in any way they can and to confuse the jury any way they can; that the prosecution was guilty of extremely bad faith; that the prosecution made a deliberate and conceived effort to mislead the jury to take their minds off the issues in the case, did not amount to such prejudicial misconduct on the part of the prosecutor under the circumstances.

The Reviewing Court then, in reference to the prosecutor's misconduct of bringing before the jury alleged violations of the law for which the defendant was not on trial, defense counsel's assignment of prejudicial misconduct and the Court's admonishment to the jury to disregard the prosecutor's statement; along with the prosecutor's continuous misconduct on the same matter which he knew to be prejudicial to the rights of the defendant, the Reviewing Court stated that there was no prejudicial misconduct, because the Trial Judge ordered the jury to disregard the statements, and further that the prosecutor indicated that no evidence had been presented relative to the count in question, that in view of the Trial Court's admonishment to the jury, and of the circumstances that the prosecution was merely referring to a matter by way of illustration to explain why he had not made an opening statement and was not referring to the matter as having been proved,

it appears that the remark which was stricken did not constitute an argument of guilt as to the dismissed count, and that no prejudice appears. It is difficult to understand how the Reviewing Court can say that prejudicial misconduct of the nature of the accusation here becomes less prejudicial after the prosecutor inferred guilt and then merely states that he has no evidence to prove it, and the Trial Court's admonishment to the jury to disregard it, could erase from the minds of the jury the prejudicial effect of such misconduct.

The State Reviewing Court then states that in conjunction with the matters heretofore mentioned appellant's complaint of the prosecutor's statement in his closing argument to the effect that defense witnesses had testified to a pattern of things which could not be true for the purpose of creating a false defense; that an objection was made and the Court directed the prosecutor to proceed was not prejudicial to the defendant in accordance with the authorities theretofore cited in the opinion.

In reference to the petitioners' complaint that the prosecutor inferred that a defense witness was guilty of similar offenses upon which the petitioners were on trial, the Reviewing Court held that the Court in sustaining defense counsel's objection and the subsequent explanation by the prosecutor, and further that no objection was made to any further remarks, no prejudice appears.

The California Reviewing Court's decision is not in accord with former decisions of the California Reviewing Courts, as set forth on pages 112 through 125 of Appellants' Opening Brief on Appeal, and more specially the case of *Blumethal v. United States,* 332 U. S.

539, wherein the Court held that the main assumption of prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction.

In the case of *People v. Lyons*, 47 Cal. 2d 311, at 318, the Supreme Court of California stated in general the duties, obligations and common decencies required of prosecuting officers, saying:

> "What was said by the Chief Justice of the United States in the case of *Viereck v. States* (1943), 318 U. S. 236, 248 (63 S. Ct. 561, 87 L. Ed. 734) (quoting from *Berger v. United States* (1935), 295 U. S. 78, 88 (55 S. Ct. 629, 79 L. Ed. 1314, 1321)), reflects our views as to the duties and obligations of a prosecuting officer. We quote; 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'"

In the case of *People v. Robarge,* 111 Cal. App. 2d 87, at p. 95, the Court said:

> "It is axiomatic that when an accused is denied that fair and impartial trial guaranteed by law, such procedure amounts to a denial of due process of law."

In the *Robarge* case, the Court said from a reading of the record that it would impeach the legal learning of counsel for The People to intimate that he did not know that the procedure was improper, and particularly calculated to prejudice the substantial rights of the accused in prejudicial misconduct before the jury, citing as authority *Powell v. Alabama,* 287 U. S. 45.

In the case of *People v. Sheffield,* 108 Cal. App. 2d 721, the Court in reversing the judgment held, at page 732, that it was the duty of the district attorney, not to obtain convictions, but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands on trial, and it is the solemn duty of the trial judge to see that the facts material to the charge are fairly presented and the constitutional guarantees of a defendant neither violated nor infringed.

In the case *In re Winchester,* 53 A. C. A. 534, at p. 537, the Supreme Court of California, in deciding the availability of Habeas Corpus as a method of collateral attack on a judgment of conviction which had been obtained in violation of the fundamental constitutional rights, cites the case of *People v. Robarge, supra,* saying that a denial of a fair and impartial trial amounts to a denial of due process of law, and is a miscarriage of justice within the meaning of the phrase as

used in Section 4½ of Article VI of the Constitution of California, and that jurisdictional defects, like constitutional defects, do not become irremediable when a judgment of conviction becomes final even after affirmance on appeal, citing *People v. Thomas,* 52 Cal. 2d 521, at p. 528. It is respectfully urged that the California Reviewing Courts have not decided a substantial Federal question in accord with applicable decisions of this Honorable Court and that the issuance of the Writ of Certiorari is necessary in order that this Honorable Court may review the record for itself and determine whether or not the petitioners have been accorded procedural due process of law in accord with the authorities hereinbefore cited.

V.

The Petitioners Were Denied Due Process of Law Within the Meaning of the Fourteenth Amendment to the Constitution of the United States for the Record Is Clear That No Criminal Offense Was Charged and There Is No Evidence of Guilt of Violation of the Criminal Laws of California.

This is a most unusual case for, while there are eighteen overt acts charged in Count One of the criminal conspiracy, many of which the prosecutor during the trial conceded that he was unable to prove and presented no evidence thereon, yet did not move for the dismissal thereof, we have no way of knowing upon which of the particular overt act or acts the jury based its verdict of guilt. We can not tell from the pleadings whether it was the position of the prosecution that the petitioners herein sold personally owned stock or

corporation stock, for the prosecution's theory was that if it was not one it was the other, and no light is shed upon the prosecution's theory from the overt acts in Count One of the Indictment or from the substantive charges of violation of the Corporate Securities Act, as alleged in the Indictment, which fails to indicate whether the securities sold were corporation stock or personally owned stock requiring a permit for the sale thereof, or that the money from the sale of the stock was directly or indirectly channelled back to the benefit of the corporation. The California Reviewing Court starts a review of the evidence presented at the trial at page 354 of the printed opinion, 184 A. C. A., on through to the top of page 377, giving a brief summary of the evidence on the counts of the Indictment of which the petitioners were found guilty as well as the counts upon which the petitioners were acquitted or upon which the jury failed to agree, and then later on in its printed opinion uses interchangeably that which the jury rejected in failing to agree on specific counts and in acquittal as evidence of guilt.

This Honorable Court's attention is called to the pleadings wherein the petitioner, Jeanne Rose Mason, while named in the so-called charging part of the criminal conspiracy, is not mentioned one time in the eighteen overt acts alleged, yet the Court holds that it may be inferred she had tacit knowledge of her husband's enterprises and representations, and further inferring that the defendants were associated in committing the substantive acts; that it could be inferred that the stock was not disposed of for the owners' own account, but rather the proceeds of the sale of stock were applied for corporate use.

The State Reviewing Court, in order to arrive at this conclusion in the most unusual way and unknown in American Criminal Jurisprudence, considers evidence rejected by the jury in acquittal on Counts II and III and rendering no verdict on Counts IV, VI, X, XII, XIII and XIX of the Indictment and declared a mistrial as to such counts, said at page 354 of the printed opinion, 184 A. C. A., that:

> "The appellants were not found guilty as to all the substantive counts on which they were tried, however, some of the testimony pertaining thereto is set forth because of its bearing with reference to the conspiracy count."

The State Reviewing Court (*People v. Mason,* 184 A. C. A. 342, at pages 390, 391), holds that the trier of fact was warranted inferring the guilt of the defendants. The State Court reaches its conclusion by drawing an *inference* of awareness and tacit approval on the part of Mrs. Mason as to her husband's representations; by further *inferring* that appellants were linked together in inducing purchase of stock by extravagent representations; by *inferring* that the sale of stock was not made for the account of the vender; by *inferring* the proceeds for the sale of the stock was for the benefit of the corporation with intent of evading the Corporate Securities Law; by *inferring* Cunningham (who did not appear in Court during the trial), played a vital role in appellants' enterprises; by *inferring* a conspiracy on the part of at least the three could reasonably be deduced and that appellants were associated in committing the substantive acts in the Indictment.

The State Court, in 22 pages of its opinion (pp. 355-377), with the use of the said rejected evidence, as intermingled with the evidence in relation to the counts of the indictment on which the jury returned guilty verdicts, takes this intermingled evidence and by building inference on inference upon inference from presumption upon presumption and thus by conjecture hold that there is sufficient evidence to support the verdicts of the jury and the judgment of conviction.

The State Reviewing Court, on page 394 of its opinion, while stating that the attorney McBain and his friends, (in relation to the grand theft charge, Count XIV), were not especially experienced in oil matters and was motivated principally by representation that the oil was now "in production", the highly technical and seldom used term of "commercial production" is applied and holds that McBain's visit to the well site and viewing the well pump oil "was not sufficient to put him on notice that the well was not in fact commercially productive", is to attribute a technical knowledge to McBain which the Court admittingly says neither he nor his friends possessed and therefore cannot be the subject of theft by false pretenses, yet in the earlier part of the opinion, at pages 375-376, relating to the testimony of a competent geologist that oil came out of the wells; that the Modco well was more or less "on production" and according to his terminology "production meant any oil that came from a formation".

The trial of the petitioners with presumptions under Section 1963 of the California Civil Code of Procedure (C. C. P.) that:

(a) (Subd. 1) "A person is innocent of crime or wrong";

(b) (Subd. 19) "That private transactions have been fair";

(c) (Subd. 20) "The ordinary course of business has been followed";

(d) (Subd. 33) "That the law has been obeyed";

(e) "Of fairness and regularity of private transactions and of good faith"; (*Jamise v. Bryan* (1948), 89 Cal. App. 2d 933, 943);

(f) "That no crime has been committed," (*Lanfried v. Bowarth* (1941), 45 Cal. App. 2d 405.)

The accused are also clothed with the presumption of innocence and the doctrine of reasonable doubt under Sections 1096 and 1096a of the California Penal Code.

In *Chicago M. St. P. R. Co. v. Coogan,* 271 U. S. 472, this Honorable Court held that whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves presumed.

In *Nelson v. Montgomery Ward & Co.,* 312 U. S. 373, 376, this Honorable Court held that the applicability of a statute to conceded facts is a question of law.

In the present case the State Reviewing Court concedingly has used evidence rejected by the jury on several counts of the Indictment resulting in acquittal and failure to agree on a verdict, on which to base inference upon inference upon inference upon presumptions and conjecture, in arriving at the conclusion that the jury was warranted in verdicts finding defendants

guilty of criminal conspiracy, violations of the California Corporate statutes requiring a permit for the sale of stock and of grand theft, by false pretenses.

In Petitioners' Opening Brief before the State Reviewing Court, the State was challenged to point out any evidence in the record which might establish their guilt (App. Op. Br. on App., p. 126), and the State's reply is found in the opinion of the Reviewing Court by the consideration of said rejected evidence and basing inference upon inference upon presumptions and conjecture as warranting sustaining the judgments.

In the most recent decision of the California Supreme Court on circumstantial evidence, *People v. Redrick*, 55 A. C. 286, at 294, decided February 3, 1961, it was held:

> "Circumstantial evidence is like a chain which link by link binds the defendant to a tenable finding of guilt. The strength of the links is for the trier of fact, *but if there has been a conviction notwithstanding a missing link it is the duty of the Reviewing Court to reverse the conviction.*" (Emphasis added.)

In the present case, the record is void of evidence of criminal conspiracy, with or without the evidence rejected by the jury in its verdict of acquittal of two counts and failing to agree on six other counts in the Indictment. Likewise, the record is void that any particular money, the proceeds from the sale of stock, was diverted to the benefit or use of any particular corporation or that under such circumstances a permit for such sale was required by law, or for that matter that such

transaction circumvented the State Corporate Law. The only evidence in the record relating to ownership of the stock sold is that it was the personally owned stock of Mrs. Mason.

There is no evidence of theft by false pretenses from a long practicing and wise attorney in the investment field, and to say this wise attorney, disclaiming technical knowledge of oil well production, relied upon a written instrument and the technical interpretation of "in production" as "commercially productive", rather than what he and his "technical assistant" observed when they flew back to the well site in Utah and personally observed the well pumping oil for a considerable period of time and recording the producing of oil from the well by moving pictures.

In *People v. Draper,* 69 Cal. App. 2d 786, it was held in reversing the judgment that mere suspicion was not sufficient to sustain a verdict and judgment of guilt, and in *People v. Hammond,* 166 Cal. App. 2d 255, it was held that probability of guilt is not sufficient to sustain the verdict and judgment, and the universal rule of law is that inference cannot be based upon inference or presumption upon presumption and the whole thereof result in guilt by conjecture.

18 Cal. Jur. 2d 481-a;

18 Cal. Jur. 2d 485-6;

Doll v. Atchison, Etc. Ry. Co., 27 Cal. App. 2d 473;

Hicks v. Harris, 21 Cal. 2d 654;

Chicago M & St. P. R. Co. v. Coogan, supra.

Prayer.

Wherefore, Petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court commanding the District Court of Appeal of the State of California, in and for the Second Appellate District, Division One, to certify and send to this Honorable Court for its review and determination on a day certain named therein a complete transcript of the record in the case numbered and entitled on its docket as No. Crim. 6746, The People of the State of California, Plaintiff and Respondent, versus Monte Glenwood Mason and Jeanne Rose Mason, Defendants and Appellants; that the judgment of the said State Court of the State of California be reversed by this Court; and that the Petitioners may have such other and further relief as seems just and proper.

Respectfully submitted,

RUSSELL E. PARSONS,

Attorney for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 708

Appendix to Petition for Writ of Certiorari to the District Court of Appeal, State of California, in and for the Second Appellate District, Division One.

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APPENDIX.

Opinion of the District Court of Appeal.

[Crim. No. 6746. Second Dist., Div. One. Sept. 2, 1960.]

The People, Respondent, v. Monte Glennwood Mason *et al.*, Appellants.

Appeals from a judgment of the Superior Court of Los Angeles County and from orders denying a new trial and denying motion in arrest of judgment. Herbert V. Walker, Judge. Judgment and order denying new trial affirmed; appeal from order denying motion in arrest of judgment, dismissed.

Prosecution for conspiracy to obtain money and property by false pretenses, to commit grand theft, and to violate the Corporate Securities Act. Judgment of conviction affirmed.

Russell E. Parsons, for Appellants.

Stanley Mosk, Attorney General, and Norman H. Sokolow, Deputy Attorney General, for Respondent.

Fourt, *J.*—An indictment was returned on December 16, 1957, by the Grand Jury of Los Angeles County: The indictment consisted of some 19 counts. Appellants (who are husband and wife) and one Clyde D. Moslander, Jr., were charged in Count I with conspiring together and with several other persons to cheat and defraud by criminal means, to obtain money and property by false pretenses and false promises;[1] to commit

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[1]Penal Code, section 182, subdivision 4, provides:
"If two or more persons conspire:
"
"
"
"4. To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform such promises."

grand theft;[2] and to violate the Corporate Securities Law,[3] commencing on or about October 1948 and continuing up to the finding of the indictment.

In connection with Count I, some 18 overt acts were alleged.[4]

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[2]Penal Code, section 487, subdivision 1, provides:

"Grand theft is theft committed in any of the following cases:

"1. When the money, labor or real or personal property taken is of a value exceeding two hundred dollars ($200); . . ."

[3](A) Corporations Code, section 25009, subdivision (a):

"(a) 'Sale' or 'sell' includes every disposition, or attempt to dispose, of a security or interest in a security for value.

"'Sale' or 'sell' includes all of the following, whether done directly or by an agent, circular letter, advertisement, or otherwise: An offer to sell; an attempt to sell; a solicitation of a sale; an option of sale; a contract of sale; a taking of a subscription; an exchange; any change in the rights, preferences, privileges, or restrictions on outstanding securities."

(B) Corporations Code, section 26104, subdivision (a):

"Every officer, agent, or employee of any company and every other person, who does any of the following acts is guilty of a public offense punishable by imprisonment in a state prison not exceeding five years, or in a county jail not exceeding two years, or by a fine not exceeding five thousand dollars ($5,000), or by both such fine and imprisonment:

"(a) [Issuance or sale of security in nonconformity with permit.] Knowingly authorizes, directs, or aids in the issue or sale of, or issues or executes, or sells, or causes or assists in causing to be issued, executed, or sold, any security, in nonconformity with a permit of the commissioner then in effect authorizing such issue, or contrary to the provisions of this division, or of the Constitution of this State."

[4]"OVERT ACT No. 1

"In pursuance of such conspiracy and to effect the object of the same, the said defendant, MONTE G. MASON, and others filed and caused to be filed, on or about October 29, 1948, Articles of Incorporation of Cane Creek Petroleum, Inc., in the office of the Secretary of State at Salt Lake City, Utah.

"OVERT ACT No. 2

"In pursuance of such conspiracy . . . on or about April 28, 1950, Articles of Incorporation of the Americol Petroleum, Inc.

In Count II it was alleged that appellant and Clyde D. Moslander, Jr., violated the Corporate Securities Law[5] in that appellants sold a security, to wit, shares of stock in Americol Petroleum, Inc., M.G.M. Petroleum, Inc., and Modco, Inc., to Frank E. Teter for $2,370 on or

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(were filed), in the office of the Secretary of State of Colorado, at Denver, Colorado.

"OVERT ACT No. 3

"In pursuance of such conspiracy . . . on or about May 22, 1952, Articles of Incorporation of the M.G.M. Petroleum, Inc. (were filed), in the office of the Secretary of State of Nevada, at Carson City, Nevada.

"OVERT ACT No. 4

"In pursuance of such conspiracy . . . on or about March 31, 1954, Articles of Incorporation of the Modco, Inc. (were filed), in the office of the Secretary of State of Nevada, at Carson City, Nevada.

"OVERT ACT No. 5

"In pursuance of such conspiracy . . . the said defendant, MONTE G. MASON, and his co-conspirator, ROBERT S. ROSS, did, on or about March 1, 1951 call at the South Gate Chapel in South Gate, California, and made purported pledges totaling $100,000.00 to the building fund of said church (none of which was ever paid), then the said defendants, MONTE G. MASON and ROBERT S. ROSS, thereafter sold many thousands of shares of stock of Americol Petroleum, Inc., to the members and friends of said church.

"OVERT ACT No. 6

"In pursuance of such conspiracy . . . MONTE G. MASON, did, in Los Angeles County, on or about 1950, sell a 10% interest in his alleged oil leases near Moab, Utah, to one E. P. Werner and a Mr. Frick for $7,500.00.

"OVERT ACT No. 7

"In pursuance of such conspiracy . . . MONTE G. MASON, did, in Los Angeles County, on or about 1951, sell to one Eric Liedberg shares of stock in Americol Petroleum, Inc., and M.G.M. Petroleum, Inc., aggregating $11,000.00.

"OVERT ACT No. 8

"In pursuance of such conspiracy . . . MONTE G. MASON, held a meeting at his home in North Hollywood on or about October

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[5]Corporations Code, section 26104, subdivision (a). (See footnote 3(B), *supra*.)

about April 20, 1955, without first having applied for and secured from the Commissioner of Corporations of the State of California a permit to do so.

In Count III it was alleged that appellants, and Moslander, in violation of the Corporate Securities Law, sold shares of stock in Americol, M.G.M., and Modco

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9, 1952, at which time MONTE G. MASON, together with one RALPH HUNT and one HENRY SORENSON, showed moving pictures of the alleged oil well purportedly owned by the M.G.M. Petroleum, Inc., and represented that the said well, at that time, was producing 9,800 barrels of oil and more than one million cubic feet of gas per day; and that the Americol Petroleum, Inc., was the parent corporation of M.G.M. Petroleum, Inc.; these representations were made to and in the presence of Atty. Houston State and Dr. Ross Huntley.

"OVERT ACT No. 9

"In pursuance of such conspiracy . . . one ROY JARMAN introduced one PAT J. PELLEGRINO to the defendant, MONTE G. MASON, sometime in the Fall of 1951 at which time he, Pellegrino, purchased $3,000.00 worth of stock in Americol Petroleum, Inc., from the said MONTE G. MASON in South Gate, California.

"OVERT ACT No. 10

"In pursuance of such conspiracy . . . the said defendants and their agents solicited and sold to one RALPH W. JAMES and members of his family of Pasadena, California, during the year 1953, shares of stock in both Americol Petroleum, Inc., and M.G.M. Petroleum, Inc., aggregating more than $100,000.00.

"OVERT ACT No. 11

"In pursuance of such conspiracy . . . the said defendants, and their agents, solicited and sold shares of stock to one WESLEY J. DURSTON in Las Vegas, Nevada and Moab, Utah, in Americol Petroleum, Inc., M.G.M. Petroleum, Inc., and Modco, Inc., aggregating approximately $143,000.00, during the years 1954 and 1955, and also, said defendants induced the said DURSTON to act as their agent in the sale of stock and collecting monies therefor in Los Angeles County, California, aggregating many thousands of dollars, which monies he either gave to defendants in person or wired to them by Western Union Telegraph Company.

"OVERT ACT No. 12

"In pursuance of such conspiracy . . . WESLEY J. DURSTON took one WILLIS E. MCKNIGHT to Moab, Utah to see the purported well then being drilled by Modco, Inc., on or about March 3, 1955, at which time he, McKnight, agreed to accept stock for

to William Kirkland for $2,370 on or about April 20, 1955, without a permit.

In Count IV it was alleged that appellant and Moslander, in violation of the Corporate Securities Law, sold shares of stock in Americol, M.G.M., and Modco

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two previous loans of $2,000.00 each in Modco, Inc., and again on March 12, 1955, he issued another check in Los Angeles County for $10,000.00 made payable to one WES DURSTON for stock in Americol Petroleum, Inc., and M.G.M. Petroleum, Inc.

"OVERT ACT NO. 13

"In pursuance of such conspiracy . . . MONTE G. MASON, went to the home of one WILLIS E. MCKNIGHT in Glendora, California, where a group of people were gathered and defendant MASON showed his moving pictures of the alleged oil wells at Moab, Utah, on or about April 19, 1955, including the Modco, Inc., well, at which time MASON sold shares of stock to a group of people and Mr. McKnight wired $6,500.00 to the First National Bank at Moab, Utah at MASON'S request on April 20, 1955.

"OVERT ACT NO. 14

"In pursuance of such conspiracy . . . MONTE G. MASON and one J. P. CUNNINGHAM, did, on or about January 3, 1955 in Los Angeles County, pick up checks totaling $15,000.00 from a number of investors for whom one ANGUS C. MCBAIN was acting as trustee in payment for stock in Modco, Inc., a Nevada corporation.

"OVERT ACT NO. 15

"In pursuance of such conspiracy . . . MONTE G. MASON and one J. P. CUNNINGHAM, did, on or about January 20, 1955, receive approximately $5,000.00 for sale of stock in Modco, Inc., from one DR. IRVING WILLS of Santa Barbara, and deposited said check in the account of said J. P. CUNNINGHAM in Los Angeles, and thereafter, said money was disbursed in large part for various and sundry purposes, other than for corporation purposes.

"OVERT ACT NO. 16

"In pursuance of such conspiracy . . . MONTE G. MASON and one J. P. CUNNINGHAM did, on or about February 7, 1955, receive a check in the sum of $5,000.00 from one DR. FRANK J. HOMBACH of Santa Barbara in payment of shares of stock in Modco, Inc., a Nevada corporation, said check being deposited in the personal bank account of said J. P. CUNNINGHAM and a

to Ervin E. Yoder, Jr., for $3,950 on or about April 21, 1955, without a permit.

In Count V it was alleged that appellants and Moslander, in violation of the Corporate Securities Law, sold shares of stock in Americol, M.G.M., and Modco to Edgar H. Mueller for $3,950 on or about April 21, 1955, without a permit.

In Count VI it was alleged that appellants and Moslander, committed grand theft by taking the sum of $5,000 from Willis E. McKnight on or about June 11, 1955.

In Count VII it was alleged that appellants and Moslander, in violation of the Corporate Securities Law, sold shares of stock in Americol, M.G.M., and Modco to Edwin A. Mayer for $2,686 on or about April 20, 1955, without a permit.

In Count VIII it was alleged that appellants and Moslander, in violation of the Corporate Securities

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large portion of which was disbursed for various and sundry purposes, other than for corporation purposes.

"OVERT ACT No. 17

"In pursuance of such conspiracy . . . MONTE G. MASON did, on or about April 19, 1955, show pictures of the alleged oil well at Moab, Utah, at the home of WILLIS E. MCKNIGHT, in Glendora, California, and represented to one HAL G. WORKMAN and others present that he, MASON, was selling a block of his own personally owned stock to get money for the benefit of the corporation.

"OVERT ACT No. 18

"In pursuance of such conspiracy . . . MONTE G. MASON did, on or about May 9, 1955, at 500 Ocean Front, Santa Monica, California, show pictures of his alleged oil wells at Moab, Utah, and make representations that one of his alleged oil wells flowed 9,850 barrels of oil through a ten sixty-fourth inch choke and also, 3,220,000 cubic feet of gas per day. These representations were made in the presence of Phillip C. McKenna, Mrs. Carol McKenna and Tom Hodge."

Law, sold shares of stock in Americol, M.G.M., and Modco to John B. Marlin for $1,343 on or about April 20, 1955, without a permit.

In Count IX it was alleged that appellants and Moslander, in violation of the Corporate Securities Law, sold shares of stock in Modco to C. F. Shemley for $680 on or about April 20, 1955, without a permit.

In Count X it was alleged that appellants and Moslander, in violation of the Corporate Securities Law, sold shares of stock in Americol, M.G.M., and Modco to Edgar H. Mueller for $2,657 on or about May 31, 1955, without a permit.

In Count XI it was alleged that appellants and Moslander, in violation of the Corporate Securities Law, sold shares of stock in Americol, M.G.M., and Modoc to Ervin E. Yoder, Jr., for $2,657 on or about June 1, 1955, without a permit.

In Count XII it was alleged that Appellants and Moslander, in violation of the Corporate Securities Law, sold shares of stock in Americol and M.G.M. to Dr. Robert O. Pearman for $2,970 on or about March 17, 1955, without a permit.

In Count XIII it was alleged that appellants and Moslander, in violation of the Corporate Securities Law, sold shares of stock in Modco to Angus C. McBain, Trustee, for $15,000 on or about January 3, 1955, without a permit.

In Count XIV it was alleged that appellants and Moslander, committed grand theft by taking the sum of $15,000 from Angus C. McBain, Trustee, on or about March 18, 1955.

In Count XV it was alleged that Appellants and Moslander, in violation of the Corporate Securities Law, sold shares of stock in Americol, M.G.M., and Modco to Angus C. McBain Trustee, for $38,950 on or about March 1, 1955, without a permit.

In Count XVI it was alleged that appellants and Moslander, in violation of the Corporate Securities Law, sold shares of stock in Americol, M.G.M., and Modco to Angus C. McBain, Trustee, for $27,300 on or about March 8, 1955, without a permit.

Counts XVII and XVIII were dismissed on motion of the People.

In Count XIX, it was alleged that appellants and Moslander, in violation of the Corporate Securities Law, sold shares of stock in Americol, M.G.M., and Modco to Clarence I. Tubbs for $1,343 on or about April 21, 1955, without a permit.

As to appellant Monte G. Mason it was alleged that he had been convicted in the Superior Court of the State of California, in and for the County of Los Angeles, of the crime of grand theft and violation of the Corporate Securities Act, a felony, and that judgment had been pronounced on or about November 7, 1947.

Appellants' motion for severance of trial from that of the alleged coconspirator, Moslander, was granted. Appellants' motion under Penal Code, section 995, was denied and each appellant pleaded not guilty. Appellant, Monte G. Mason, first denied the prior conviction alleged, then subsequently admitted it.

Appellants were tried before a jury which found them guilty as charged in Counts I, V, VII, VIII, IX, XI,

XIV, XV, and XVI. As to Counts II and III, appellants were found not guilty. As to Counts IV, VI, X, XII, XIII, and XIX, the jury was unable to arrive at a verdict and the trial judge declared a mistrial as to such accounts.

Upon return of the jury's verdicts of guilty on the aforementioned nine counts of the indictment, a motion for a new trial and for arrest of judgment under the provisions of section 1185 of the Penal Code was made.

Appellants' motions for new trial were denied. As to appellant Monte Mason, the court found the prior conviction true and he was sentenced to imprisonment for the term prescribed by law on the counts of which he was found guilty. As to appellant Jeanne Mason, the court sentenced her to imprisonment in the California Institution for Women for the term prescribed by law.

Each appellant appealed from the judgment of conviction, order denying motion for new trial, and order denying motion in arrest of judgment.

The purported appeal from the order denying the motion in arrest of judgment is dismissed. This is not an appealable order. (People v. Mills, 148 Cal. App. 2d 392, 409 [306 P. 2d 1005]; People v. Tidwell, 108 Cal. App. 2d 60, 62 [238 P. 2d 21]; 3 Cal. Jur. 2d, §91, p. 542.)

The trial of this matter lasted some seven weeks, with a resultant reporter's transcript consisting of 12 volumes and containing some 3,251 pages. The briefs consist of 275 pages.

The appellants were not found guilty as to all of the substantive counts on which they were tried, however,

some of the testimony pertaining thereto is set forth because of its bearing with reference to the conspiracy count.

A résumé of some of the facts is as follows:

Appellant, Monte Mason, was instrumental in organizing Cane Creek Petroleum, Inc., whose articles of incorporation were filed in Utah on October 29, 1958; Americol Petroleum, Inc., whose articles were filed in Colorado on April 28, 1950; M.G.M. Petroleum, Inc., whose articles were filed in Nevada on May 22, 1952; and Modco, Inc., whose articles were filed in Nevada on March 31, 1954. It was appellant Monte Mason who requested the United States Corporation Company to organize the latter two corporations, with dummy incorporators being used.

Robert M. Hale, a special investigator for the Division of Corporations, State of California, testified that the files of the Division of Corporations, disclosed that *no permit to issue or sell stock in the State of California had been issued* to appellants, Americol Petroleum, Inc., M.G.M. Petroleum, Inc., or Modco, Inc.; nor had there been a request for a permit filed on the part of any of these individuals or companies.

For purposes of clarity, the various transactions will be set forth under separate headings as follows:

A. The October, 1952, Meeting at Appellants' Home:

A meeting was held at appellants' home in North Hollywood, California, in October, 1952, at which time Monte Mason talked about oil wells and an oil field in the area of Moab, Utah. He produced a fruit jar that contained some oil and demonstrated how it burned. He

told the group of people present[6] that he was experienced in oil matters and that he had drilled many wells. He represented that his companies had a well in Utah which was producing oil at the rate of 9,800 barrels per day and that the oil sold at the well for $4.10 per barrel; that they were realizing about $40,000 a day from the output of this well and that they expected to "spud in" a second well within a few days. Mason stated that wells were being drilled on leases obtained by himself and his wife; that they had formed Americol Petroleum, Inc.; that the other corporation involved was M.G.M.; that M.G.M. stood for his initials. He related further that he and his wife had assigned the leases to Americol in consideration of receiving 2,800,000 shares of stock which represented over half the stock of the company, and that they had some stock for sale; that anyone who bought stock in M.G.M. would have an option on Americol stock.

Monte Mason ran a film which showed a producing well, stating that it was an old well which had come in before the war and had been capped. During the course of the meeting Slate asked whose stock was being sold. Mason said that it would be from his wife; he said further that he had no stock in his own name because of the possibility of lawsuits in drilling operation. Slate asked the mechanics of purchase, and Mason said, *"Well, we can't do it the easy way, I have got to get around the Corporate Securities Act."* (Emphasis added.) Mason said that another individual had put some money in and that they had taken him to

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[6] (a) Houston H. Slate; (b) Dr. Huntley; (c) Mr. Sorensen; and (d) Ralph Hunt.

Las Vegas, Nevada. He suggested the appointment of an agent in Las Vegas to whom the stock could be transferred. He referred to a Rulin Earlin as an attorney representing him in Las Vegas. He said too that he had turned down more than $60,000 in the past few days because he did not like the looks of the people.

During the evening, there were three telephone calls which supposedly were from the well area. Mason could be heard talking from the telephone, saying, "Great, great, that is tremendous." He reported back to the group that progress was wonderful up there and that it looked better all the time. He also said to one of the persons present that if the latter wanted to get in on the deal he would need to have his money in by the following Saturday because things were going very rapidly.

B. The Willis E. McKnight Transactions

Willis E. McKnight, a resident of Glendora, California, first met Monte Mason on March 11, 1955, having been introduced to him by Wesley Durston at a well site in Moab, Utah. On his arrival at the site, it appeared that the well had just come in (that is, McKnight was so advised by Mason). McKnight assumed it had come in from seeing a quantity of oil on the ground around the derrick and on the platform. McKnight, Durston, and Mason talked about the gravity of the oil, the approximate quantity, and the number of barrels per day the well would produce. Mason stated that the well had good possibilities from a test that had been made and that it looked as if it ought to go at four or five hundred barrels a day or more. Mason

stated that the well belonged to Modco, that it was being drilled by himself and that he was the operator.

Prior to this occasion, McKnight had discussed the operations and oil wells with Durston. He had loaned Durston $2,000. After his meeting with Monte Mason, McKnight asked Mason if the loan which he had made to Durston could be used to buy stock in Modco, and Mason replied that it could.

In April, 1955, during a conversation between McKnight and Mason, Mason inquired as to whether McKnight had any friends who desired to buy stock in the company; that funds were needed to get the operation going because of some trouble. Mason stated that the stock to be sold would be treasury stock and that he needed the money for the payroll and for the various subcontractors.

At Mason's request, McKnight invited several people to his home in April. McKnight recalled two such meetings at his house, and particularly the occasion of April 19th. At that meeeting, Mason told the persons present about the old M.G.M. well, stating that water had entered the well and congealed the oil; that they had talked with the Dow Chemical Company in an effort to work out a solution; and that the new Modco well was producing about 40 gravity oil which was very good. Mason then ran a film showing the area in question. He said they were selling stock because they needed more funds; that they had to purchase casing and meet payrolls; that they were having trouble losing tools with respect to the Modco well. Mason also stated that Modco stock could be bought but that one also had to buy shares in Americol and M.G.M.

At Mason's request, McKnight agreed to act as trustee for his (McKnight's) friends. When Mason was asked whose stock it was which was up for sale he said there were plenty of shares left in each corporation and that they also had an option on several thousand shares which were going to be donated back to the company if they were sold.

After one of the meetings at his home, in April, McKnight telegraphed $6,500 to Modco, Inc., at Moab, Utah, at Mason's instructions in connection with the purchase of some stock.[7]

McKnight made three checks payable to the order of Modco, including People's Exhibit 41, which was a check for $2,000 dated May 4, 1955, made so payable on Mason's instructions. In delivering the checks to Mason, McKnight stipulated that they would be for corporate uses. McKnight indicated that he did not want stock for all of the checks; he wanted the money back. He did get stock for part of the money.[8] The stock certificates were mailed or delivered to him.

McKnight received money from a number of different people for the purpose of purchasing stock in the corporations.[9] This money was sent at Mason's direction by Western Union or mailed to Modco at Moab,

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[7]*Source of money:* Edwin and Norma Mayer; John B. and Carra Marlin; Charles and Ethel M. Shemely; and Willis or Dorothy G. McKnight.

[8]12,000 shares of Modco; 680 shares of Modco; 7,500 shares of Modco (People's Exhibits 42, 43, and 44).

[9]Edgar H. and Audrey M. Mueller; Erwin and or June M. Yoder, Jr.; Erwin and Cuba Yoder, Sr.; Walter and or Irmgard K. Schilling; John B. and Carra Marlin; Willis F. and Dorothy G. McKnight; Clarence L. and Gladys Tibbs; Frank and Ruby Teter; and William and Ethel H. Kirkland.

Utah, or to Glenn and Parent, Trustee, Grand Junction, Colorado.

On or about June 11, 1955, McKnight again saw Mason. The latter indicated that he needed some additional money for withholding taxes against Modco.[10] On this occasion, McKnight gave Mason a check for $5,000 as a loan. Mason had requested either a loan or the purchase of more stock. The money was loaned on the assurance it would be repaid within ten days. McKnight recalled that a Mr. Hudson and possibly a Mr. Cunningham accompanied Mason on this occasion. McKnight was solicited at his office.

McKnight recalled an occasion at Moab, Utah, when Mason was present and he met a Darrell Reardon. He understood Reardon was an employee of the corporations. He also met a Clyde Moslander at Grand Junction, Colorado, in the office of Glenn and Parent. Appellant Jeanne Mason was also present on this occasion. McKnight observed Monte Mason sign stock certificates for the corporation. He recognized the signatures of M. G. Mason on stock certificates[11] as being those of appellant Monte Mason. Moslander may have signed some certificates.

On one occasion McKnight was introduced by Mason to a James Cunningham. Mason said that Cunningham was his business manager and further stated that any information that McKnight desired, including matters concerning Modco or M.G.M. could be obtained from Cunningham.

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[10]No payment on account of withholding taxes re: account of Modco, Inc. was reflected in files of the Internal Revenue Service for the area, nor was the filing of any withholding tax return reflected therein for the months of June, July, August, and September, 1955.

[11]See footnote No. 8, *supra*.

C. The Frank E. Teter Transaction:

About April, 1955, Teter, a rancher, was invited to the home of his neighbor, McKnight, in Glendora, California. There he met Mason and was shown some moving pictures of an oil project in the area of Moab, Utah, by Mason. During the picture showing Mason explained that the oil was emulsified and that money was needed to seal off the well and pay the help. Mason further stated that the property was on the Modco lease that they had optional stock to sell; that for each share of Modco stock one had to buy so many shares of Americol and of M.G.M. in $5,000 blocks.

Subsequently, Teter discussed the purchase with some of the other persons present. He made out a check dated April 20, 1955, for $2,500 to the order of one William Kirkland. He and Kirkland were taking a block of $5,000 and McKnight was to act as trustee to hold the stock. Later, Teter received some shares of stock through the mail.[12]

D. The William Kirkland Transaction:

William Kirkland, a contractor, had known Teter for many years and had a conversation with him some time in April, 1955, concerning the purchase of stock in M.G.M., Americol, and Modco. He received a check from Teter and also gave a check of his own to McKnight. Subsequently, he received stock certificates from McKnight.[13] This all occurred in Los Angeles County.

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[12] 600 shares in M.G.M. and 1,200 shares in Americol (People's Exhibits 6 and 7).

[13] 600 shares in M.G.M. and 1,200 shares in Americol (People's Exhibits 8 and 9).

Mayer, a contractor, also attended a meeting at McKnight's home in April, 1955. He also observed the moving pictures and heard Mason's explanations. Mason stated that money was needed to clean up the well and get operations going again and also to pay social security and unemployment taxes which were in arrears. Mason referred to Modco, M.G.M., and Americol Companies. He stated that the oil was the best oil ever produced this side of Pennsylvania; that when the first well came in and the money resulting therefrom would be available, they would use part of it to bring in another well, part would go to some of the other companies, and the balance would go to the investors.

Mason further stated that it was necessary to buy stock in $5,000 blocks but that if one did not want to buy that much one could purchase half of it with McKnight acting as trustee for the stock. Thereafter, Mayer gave McKnight a check for $2,686 dated April 20, 1955, and subsequently received in the mail his certificates for the shares of stock.[14]

F. The John Marlin Transaction:

John Marlin, a contractor, met appellant Monte Mason at McKnight's house in March, 1955. Mason ran some film for the group there. He explained an area on a map indicated for Modco. He stated that oil had been overflowing from the tanks; that some oil had been hauled to Salt Lake City; that the first well had been drilled in 1921 but had to be capped because it overflowed into the river; that they had to clean out the present well; that it was necessary to bring in an outfit from New Mexico to cement the bottom of it,

[14] 1,300 shares in Americol and 680 shares of M.G.M. (People's Exhibits 11 and 12).

and that they had to issue some more stock because they needed more money to cement the well. Mason further explained that they were selling stock in Modco and he indicated a connection with M.G.M. and Americol which had adjacent leases. Mason stated that his wife (appellant Jeanne R. Mason) had the lease on the property in question.

Marlin said that he had previously bought stock in Americol and M.G.M. and he was therefore interested in purchasing Modco stock. Mason stated in effect that it was possible to purchase Modco shares in proportion to shares previously purchased in M.G.M. and Americol; that at least 5,000 shares of Modco should be purchased and that the stock would be held in trust by McKnight.

At Mason's direction, Marlin made a check dated March 25, 1955, in the sum of $1,003 payable to the order of the Robert Parent Company; he made another check in the amount of $340 payable to the same order. Mason stated that the Robert Parent Company was handling the issuance of the stock. Marlin also wrote another check for $1,343 dated April 20, 1955, with which, together with the other two aforementioned checks, he purchased stock in Modco, Americol, and M.G.M.

At various times Marlin received stock certificates. (340 shares of M.G.M., and 680 shares of Americol had been delivered to him by McKnight prior to the time Marlin met Mason.) The other certificates were received by Marlin through the mail from the Glenn Parent Company.[15]

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[15] 1,360 shares of Americol and 680 shares of M.G.M. (People's Exhibits 16, 17 and 19).

G. The E. E. Yoder, Jr., Transactions:

Yoder, Jr., a contractor, attended a meeting on April 19th or 20th, 1955, at McKnights residence where he saw appellant Monte Mason. Yoder was accompanied by a business partner, Edgar Mueller, among others. At the meeting, Mason spoke and narrated a film. Mason told of bringing in a well that gushed some 300 to 400 feet over the derrick. He said that there was some trouble with magnesium chloride water getting into the oil; that the oil was of a high paraffin base and that money was needed to continue operations, to meet current obligations, and to clean out the well and finish the casing. In stating that money was needed for corporate obligations, Mason referred especially to Modco.

Mason said that he would sell some of his personal stock to raise the money; that there were three companies in which he was the principal stockholder; that Modco had a producing well; that in order to purchase stock in Modco, it was necessary to also buy stock in Americol and M.G.M., the other companies; that Modco stock could be purchased in blocks of 15,000 or more, and inasmuch as the persons present were not anticipating purchasing that quantity, Mason would put the stock in trust for them. At Mason's suggestion, it was agreed that McKnight would act as the trustee.

Mason also said that they should make out cashier's checks payable to Glenn L. Parent Company which would issue the stock to them; that such company was the auditor for the corporations. Thereafter, Yoder decided to purchase stock. He purchased a cashier's check with a personal check in the sum of $3,950 dated April 21, 1955. The cashier's check was made payable

to Robert L. Parent, Trustee. Yoder gave the check to McKnight. Shortly thereafter, Yoder received various stock certificates.[16]

In June, 1955, Mason came to Yoder's office in Downey, California, at which time Yoder's business partner, Edgar Mueller, was present. Mason said that they had been shipping some Modco oil to Salt Lake City; that the well had been swabbed out, but that the swab had been lost and he had sent to New Mexico for a fishing tool to recover the swab; that he had put a charge loaded with shot down in the bottom of the casing to perforate the casing; that additional funds were needed for this operation and that he was willing to sell some of his stock. Mason explained that he would sell it on the same ratio as before (*i.e.*, so many shares of Americol, of M.G.M., and of Modco). Yoder indicated a preference for more of Modco and less of the other two and Mason agreed. Mason was in a hurry, stating that he had to fly back that night and needed the money immediately; that he would take Yoder's and Mueller's check made out to Robert L. Parent as trustee. Mason also stated that the firm of Glenn and Parent would issue the stock. Yoder gave a check to Mason dated June 1, 1955, for $2,657. Thereafter, in the mail, Yoder received a certificate for 400 shares of M.G.M. stock.

H. The Edgar Mueller Transactions:

Mueller, a contractor, first met appellant Monte Mason on April 19, 1955, at McKnight's home in Glendora. Mueller had gone there by invitation with his business associate, Yoder.

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[16]1,000 shares of M.G.M. and 2,377 shares of Americol (People's Exhibits 24, 25 and 26).

A film was run and Mason explained the setup and stock structure as before. There were a number of questions between the persons present at the meeting. Mason stated that he would sell some stock and that it was his own stock. He said that the Modco stock was the most attractive but that he would not sell it unless the parties purchased proportionate shares of stock in the other two companies. It was agreed that the checks for the stock would be given to McKnight who would send them in with his own.

In accordance with Mason's instructions, Mueller purchased a cashier's check in the sum of $3,950.25 made payable to Robert L. Parent, Trustee. This check was transmitted to McKnight. The record discloses that it was endorsed by Robert L. Parent, Trustee, and C. D. Moslander, Jr., the latter having signed many of the stock certificates as assistant secretary. Subsequently, Mueller received by mail various certificates of stock.[17]

Some time after the meeting at McKnight's house, Mueller saw Mason at his (Mueller's) office in Downey, California. Yoder was present. Mason explained that they were having some difficulties and needed a few more thousand dollars to put the well in production. Mueller had his wife make out a check for $2,657. It was also made payable to Robert L. Parent at Mason's direction. Mason stated that he would not have time to wait for a cashier's check inasmuch as he had to catch a plane that evening to go back to the well. Mason stated that Robert L. Parent was an accounting firm in Grand Junction, Colorado.

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[17] 1,000 shares of M.G.M.; 2,370 shares of Americol (People's Exhibits 31, 32 and 33).

Subsequently, Mueller received a stock certificate in the mail.[18] Later, Mueller spoke with Mason by telephone and inquired as to whether Mason could legally sell his stock; Mason replied that he could.

I. The Clarence Tubbs Transaction:

Some time shortly before March 22, 1955, Tubbs, a contractor, went to McKnight's house at the request of the latter where he met appellant Monte Mason. Mason showed a short film, stating that they had a well which they thought was a producer and that money was needed to finish it. Mason explained that he could raise the money by selling stock in M.G.M., Americol, and Modco in a certain ratio. He also said that they had borrowed equipment from Modco to put the well in and they only had so many days to use the material.

On or about March 22, 1955, Tubbs flew to Moab, Utah, with McKnight and Mr. Wood. Durston met them at the airport. They all went to the well site with Monte Mason. At the well site they had a discussion with Mason and he referred back to the film. He showed where oil had supposedly been flowing and indicated that certain material had been mixing with and impeding the flow, stating that money was needed to drill through and rectify the condition. Mason explained the ratio in which they would have to purchase stock.

Thereafter, Tubbs did purchase some stock. He made a check dated March 25 to the Robert Parent Company for $1,003. This check was drawn pursuant to McKnight's instructions and was transmitted to McKnight for the purpose of buying stock in M.G.M.,

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[18]400 shares of M.G.M. (People's Exhibit 35).

and Americol. Subsequently, Tubbs received the certificates.[19]

On a later occasion, Tubbs purchased a cashier's check made payable to the order of Robert L. Parent, Trustee, dated April 21, 1955, for $340, and gave it to McKnight for the purpose of purchasing Modco stock.

J. The Charles Shemely Transaction:

Shemely, a subdivider, attended a meeting at McKnight's house about April 19, 1955. Appellant Mason showed a motion picture which depicted a flowing well and some tanks. He told about the approximate flow of the oil, and how they had to haul the oil to Salt Lake City; the difficulty with the well because of the foreign matter coming into it; how they needed money to meet payrolls and to clean out the well and that this was the reason that stock was being sold. Mason said that Shemely could purchase stock in two of the different companies, one of them being M.G.M., as Shemely recalled. He said that Shemely would have to buy $5,000 worth to participate in a third company, Modco. Also, Mason stated that Shemely could not buy stock in Modco in his own name, but only through McKnight as trustee.

Shemely wrote a check dated April 20, 1955, in the sum of $680 to the order of McKnight and gave it to the latter. He never received any certificate in Modco.

At some time prior to the aforementioned meeting, Shemely had spoken with McKnight about the purchasing of stock in the various corporations. He had given a check dated March 23, 1955, in the sum of $2,000

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[19]680 shares of Americol, and 340 shares of M.G.M. (People's Exhibits 37 and 38).

to McKnight. Shemely then received certificates from McKnight.[20]

K. The Angus C. McBain Transactions:

McBain, an attorney in Los Angeles, was acquainted with appellants. On or about September, 1954, he went to appellants' home in Studio City, California, at the invitation of R. A. Meader, Prescott Metcalf, and James P. Cunningham, all of whom were present at appellants' home. Appellant Jeanne Mason was in and out of the room. Upon one occasion at this meeting, Monte Mason said that his wife was the owner of sufficient stock to have control of Americol Petroleum, Inc., and M.G.M. Petroleum, Inc., and that these corporations held leases on government property on the Colorado River near Moab, Utah. Appellant Monte Mason related that around 1925 or 1926 some wildcat outfit had drilled into oil on what had been the Americol Petroleum property; that there had been a gusher but that it was uncontrollable and at that time an old-fashioned cable outfit was the means used to dig the well. Mason further stated that he had acquired some of the leases; that he had drilled on the property and had brought a considerable amount of oil to the surface but an emulsification problem had developed. He mentioned another well where oil had been found, but which had to be plugged because of inadequate equipment. Mason said that he had some difficulty with one group of stockholders; that there were between two and three million shares issued in each of these corporations, and that his wife owned the stock and that she was willing

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[20]680 shares of M.G.M., and 1,360 shares of Americol (People's Exhibits 94 and 95).

to sell some at which he felt was a fair price or sacrifice. He then showed some pictures of the wells and the property. Mason stated that the reason the stock was being sold was that money was needed to put the wells on production. Meader and Metcalf stated that they had been to the property and had seen evidence of oil. McBain informed Mason that he was interested, and that he had a friend whom he would like to bring to the house. Mason invited McBain to return.

McBain next saw appellant Monte Mason about a week later at the latter's house. Jeanne Mason may have been present. Also present were a Dr. Grunigan and another doctor. Monte Mason gave the group a brief description of the property, stating that they had been whipstocking and doing other work, and were short of funds. He explained that his wife proposed to sell some of her stock and that the money would be used for producing the wells. He mentioned that he had an independent source of income from some Louisiana interests and that no officer of the corporation would draw any money. One of the group present said that they would consider the matter and be in touch with Mason later.

About a week after the above meeting, there was another meeting with Mason at the latter's home. Jeanne Mason may have been present. McBain was accompanied by Charles Scharf. Scharf was a businessman who had speculated in oil before. Mason repeated the history of the field.

Subsequently, that same month, McBain and Dr. Grunigan again saw Mason at the latter's home. The doctor referred to a telephone conversation with Mason in which the doctor said that they did not want to go

into the venture but that Mason had an idea which would take the risk out of it. The doctor asked Mason to explain his idea. Mason said that they had to raise money; that his (Mason's) home was worth between sixty and seventy thousand dollars; that there was only a trust deed against it of $12,000; that he would give a second trust deed on his home for whatever amount they cared to raise and he would pay interest on it; and as an inducement he would give them shares of stock in Americol or M.G.M.

Since there was more than one investor in this particular group, Mason suggested that the shares of stock issued in the trust deed should be put in the name of one person so that when they were producing oil the corporations could be dissolved and per cents issued, and that 27½ per cent depletion allowance for tax purposes could be carried home to the individual investors. It was suggested that the shares be placed in McBain's name, and arrangements were made for a trust deed on the Mason property.

After a meeting at the escrow company where the transaction was consummated, McBain and Dr. Grunigan flew to Moab, in November, and saw appellant Monte Mason there. Subsequently, some time in December, another meeting took place at the Mason home at which appellants, Dr. Grunigan, James Cunningham, and McBain were present. Mason said that the expense of whipstocking was killing them financially and that they had run out of funds; that he (Mason) had arranged with M. G. M. to farm out 80 acres of their lease to a corporation which had just been organized by the name of Modco, Inc.; that the purpose of the farming out was to attract more capital; that the corpora-

tion was issuing six or seven hundred thousand shares of stock to Jeanne Mason; that the stock was issued to Mrs. Mason with the understanding that she would use it to raise the money necessary to drill a well on the Modco property. Mason explained the price of the stock and the amount of money needed for drilling. McBain told Mason that they were not interested in a direct stock investment. Mason replied, "Well, suppose I secure this one, also, and I will give you some stock as an inducement." Then he said he would give them a chattel mortgage on the oil field equipment in Utah, which was in his wife's name; also that he would give them a note for carrying, bearing six or eight per cent interest and added: "If you fellow's put up $15,000 of this, I will give you 20,000 shares of Modco stock." Cunningham produced an inventory of equipment in the field, and Mason indicated that it was clear, stating that the proposed security was worth several times $15,000. As a further inducement to the making of the loan, Mason said that he would give them an option exercisable 10 or 15 days after the Modco well had been placed on production to purchase 15,000 shares of Modco stock at a dollar a share and if they exercised the option, all they would have to do would be to give the satisfaction on the note and chattel mortgage. Mason further stated that he had to get the money immediately and to guarantee that they had proper title on the chattels he would pledge to them 400,000 shares of Mrs. Mason's stock in Modco. Mrs. Mason may have been present at that particular time. McBain said that the deal would be considered. Several days later, McBain called Mason and told him that on his certification that the equipment was clear, they would put up $15,000 on a chattel mortgage.

McBain had a meeting between Christmas and New Years, 1955, at his house with appellant Monte Mason and Cunningham on which occasion Mason said that he had to go over to the property in Utah and that Cunnigham would take care of the details in receiving the $15,000 and would deliver the chattel mortgage and promissory note. At this time, also, Mason said that he was hard pressed for money. McBain stated that he would advance Mason a thousand dollars on account of the $15,000, and he gave him a check for that amount.

On January 4, 1955, Cunningham came to McBain's office in Los Angeles at which time Cunningham produced a chattel mortgage dated January 3, 1955. The name Jeanne R. Mason already appeared on it. McBain told Cunningham that he (McBain) could not release any funds until a promissory note was signed by Mrs. Mason. At Cunningham's request, McBain prepared a note and Cunningham left the office stating that he would get Mrs. Mason's signature. He returned the same day with the signed note. He also gave McBain a letter of agreement. The record discloses that it bore the signature of Jeanne R. Mason, with J. P. Cunnigham as a witness, and that it referred to 20,000 shares of Modco stock as being part of the consideration for the loan; that 400,000 shares of Modco stock was being given as security to guarantee that the property covered by the chattel mortgage was clear; and provided the right to exercise the option of purchasing 15,000 shares of Modco for a period of 15 days after notice that the well was on production. Cunningham related that he had with him some checks which he had picked up in connection with the transaction. McBain gave Cunningham some additional checks. A total of

$15,000 was turned over to Cunningham in the form of checks, including the check for $1,000 which McBain had previously given Monte Mason. Cunningham indicated that Glenn and Parent of Grand Junction, Colorado, the transfer agents, would mail the stock certificate for 20,000 shares of Modco to McBain as trustee. Subsequently, the same month, the aforementioned stock certificate was received.

Thereafter, up until March, 1955, McBain had several conversations with Cunningham about drilling the well and what had been taking place in Utah. On one occasion, Cunningham told him that they soon expected to be entering the production zone.

On March 5, 1955, Cunningham came to McBain's home and presented a document on that date on the letterhead of J. P. Cunningham, Business Management, which stated that the well was on production. This document referred to the option portion of the letter of agreement and it bore the signature of J. P. Cunningham for Jeanne R. Mason.

At Cunningham's suggestion, he, McBain and Mr. Scharf flew to Moab, Utah, where they met appellant Monte Mason at the office of M.G.M., Americol, and Modco. A Mr. Gray and some other people were present. Someone stated that the well was really "blowing." They then proceeded to the site, where they met a John Heatherington, the superintendent. Mason told Heatherington to turn on the well. Oil began to come out of the well. They then proceeded to a storage tank and observed oil gushing through the pipe which looped over the top of the tank.

On returning from the site to the office in Moab, they had some further conversation with Mason. He

said that now that this well was in production he thought they should proceed rapidly and start drilling; that he had options on M.G.M. and Americol stock which he was willing to sell in "units" consisting of one share of M.G.M. and one of Americol for not more than $2.10 per unit on condition they would give him an option to buy back every sixth share. Mason stated he did not want to sell the stock but needed funds. Mason also discussed with McBain whether the latter would exercise the aforementioned option of cancelling the $15,000 chattel mortgage, and McBain said that he would take it up with the persons interested upon his return to Los Angeles.

Upon his return to Los Angeles, McBain had a conversation with Cunningham, then he (McBain) executed a form of satisfaction of chattel mortgage to release the indebtedness of $15,000. According to McBain's testimony, the reason he executed the form of satisfaction to release the indebtedness was "in reliance on a statement made to me that the well was on production." McBain either mailed the satisfaction to Mason's house or transmitted it to Cunningham.

In exchange for exercising the option and eliminating the debt, McBain received a certificate for 15,000 shares of stock of Modco, Inc. He received it in his office some time in March, 1955, either through the mail or from Cunningham personally.

On March 8, 1955, McBain purchased two cashier's checks, each in the sum of $19,475, payable to Glenn and Parent. On the same day, a third check (personal check) in the amount of $27,300, along with the two cashier's checks, was turned over to Cunningham in order to purchase "units" of stock of Americol and

M. G. M. in accordance with Mason's offer earlier that week in Moab. Subsequently, McBain, as trustee, received certain certificates.[21]

With respect to the $15,000 loan which McBain cancelled when he exercised the option, he never got back any part of the sum originally loaned.

As to whether or not there was ever a Modco well in production, the reporter's transcript discloses:

"Q. Now, you were asked on cross-examination, sir, by Mr. Strong, whether you had learned whether anything that Mr. Mason had said was untrue. You answered 'No.' Let me ask you, Mr. McBain, did you ever learn as a matter of fact whether or not there was a Modco well ever in production?

". . .

"The Witness: Yes. It was my information there wasn't . . ."

L. The Robert O. Pearman Transaction:

Dr. Pearman was residing at San Luis Obispo, California. He met Mason at his (Pearman's) office early in February, 1955. Cunningham was also present and he, along with Mason, represented that the former was Mason's secretary and more or less in control of the financial end of the venture which Mason was proposing. Mason stated that he had a lease on some property near Moab, Utah; that some years before an oil well had been drilled there; that the oil had flowed into the Colorado River; that the farmers had objected and that the well had been cemented; that subsequently he secured a lease from the Cane Creek Company and

[21] 32,390 shares of Americol and 32,390 shares of M.G.M. (People's Exhibits 66, 67, 68 and 69).

had drilled another well. He showed motion pictures of the well and oil coming out of the ground and running into a trough. He said that he needed more money to bring the well in; that if Dr. Pearman would invest some money he would receive a tax advantage because his checks would come from the refinery; that he (Mason) could obtain capital in the East, but that he desired to maintain control of the property within a small group and that there was some stock which Dr. Pearman would receive as representing his share of the venture. Dr. Pearman gave a $5,000 check made payable to Cunningham at Mason's direction in that Cunningham was Mason's representative. Subsequently, Dr. Pearman received some shares of Modco stock.

In early March, 1955, Dr. Pearman met appellant Monte Mason and Cunningham at a hotel located in Los Angeles. They had a discussion about the well and the stock. Mason said that if Dr. Pearman was interested he could buy some additional shares in the venture, the stock now being in Americol and M. G. M. in a certain ratio. After further discussion, Dr. Pearman sent a check for approximately $2,970 to Glenn and Parent in Grand Junction, Colorado, as directed. Presently, he received, through the mail, a certificate for 1,000 shares of M.G.M. and a certificate for 2,000 shares of Americol.

M. The Meeting at the McKenna Residence:

On the afternoon of May 9, 1956, Monte Mason came to the residence of McKenna in Santa Monica, California. Prior to Mason's arrival, other persons arrived, including Mr. Hodge of the Better Business Bu-

reau and Mr. Brownson of the district attorney's office. Brownson installed some concealed microphones in the house, along with a tape recording apparatus. McKenna had given his consent, but all of this was unknown to Mason. Hodge was introduced to Mason as a friend of McKenna, who might be interested in Mason's venture. Mason, who had previously discussed an oil venture with McKenna, showed a film relative to a well in the Moab area which was flowing oil, and a conversation ensued within the range of the hidden microphones. The recording apparatus was operated by Brownson.

The tape recording which was played to the jury reflected, among other things, that Mason stated that Moab was booming; told of the area near the Colorado River; told of a well having been drilled in 1925; that said well had flowed considerably; that the oil was of better grade than that produced in Pennsylvania, Ohio, et cetera; that the property was in litigation. While showing the films, Mason discussed the history of the field and related that he started certain operations in 1950 when he paid Cane Creed for an option. He described the difficulty caused by the magnesium chloride water getting into a well and how the well had to be cemented. He then described other operations. He said the well which his group operated had flowed 9,856 barrels of oil through a ten sixty-fourth choke hole, and 3,226,000 cubic feet of gas; that the well had to be "killed" because there was no way to get casing into the ground, and that the well had produced 30,000 barrels of oil a day. He described the trouble they were having with a subsequent well sanding up, stating that the well flowed hard but that it

needed to be cleaned out, and that they were using the Halliburton Company testing services. He indicated that the Modco, well on which they were not concentrating, was none the less flowing commercial oil, stating at one time, "This is a good commercial well at this minute," and at another that he "could definitely say that it is on commercial production right now."

Further, Mason described the companies that he and his wife controlled, saying that they all were domesticated to do business in Utah. In this connection he told of Modco, Americol, and M.G.M., and also mentioned Standard Consolidated, indicating that he was offering shares in these companies. He pointed out their holdings on a map. He referred to the terms of government leases, and referred to Cane Creek Oil Company as the original lease, with his wife as the operator, and with the operating agreement covering various leases. He said that the leases were in his wife's name and that assignments were made to the different corporations; that he was offering the persons present stock in the corporations; that he was offering a "package deal" as to the purchase of stock in the companies.

N. Records of the Department of the Interior:

I. Records of the Land Office, Utah.

Ernest L. House, Manager of the United States Land Office for the State of Utah, Department of the Interior, had access to the gas leasing records for that state. He ascertained that prior to June, 1956, with respect to the leases known as Salt Lake 064948, 064040, 064950, and Utah 0496, there was no record of any interest therein in the name of either of the appel-

lants, M. G. M. Petroleum, Inc., Modco, Inc., Americol Petroleum, Inc., or Standard Consolidated Petroleum Inc. No interest in oil or gas leases, nor any operating agreements on the part of Modco, were reflected in the records.

House identified People's Exhibits 101 and 102, indicating respectively, lease Number 064948 dated January 1, 1948, issued to one John L. Shafer from the United States Government, and an assignment thereof dated October 19, 1951 to the Cane Creek Oil Company. He identified People's Exhibit 103, indicating lease Number Utah 0496 dated January 1, 1950, issued to one Frank Shafer from the United States Government. People's Exhibit 104 reflected an assignment of the last mentioned lease to the Cane Creek Oil Company dated October 19, 1951. People's Exhibit 105 reflected an operating agreement between Jeanne R. Mason, as operator, and Cane Creek Oil Company, as non-operator, dated October 31, 1951. People's Exhibit 106 reflected an operating agreement similar to that denoted in People's Exhibit 105. People's Exhibit 107 reflected an assignment of an operating agreement from Jeanne R. Mason to Americol Petroleum dated November 19, 1951. People's Exhibit 108 reflected an assignment of an operating agreement from Jeanne R. Mason to Americol Petroleum dated October 31, 1951. People's Exhibit 109 reflected an assignment of an operating agreement from Jeanne R. Mason to M. G. M. Petroleum dated September 23, 1952. People's Exhibit 110 reflected a partial assignment of an operating agreement from Jeanne R. Mason to Modco, Inc., dated November 18, 1954. This latter attempted assignment was not received in House's office until January 11,

1955, and was denied approval as reflected in a decision denoted People's Exhibit 111 dated August 4, 1955.

The land described in the assignments denoted Exhibits 108 through 110 was embraced in the leases denoted Exhibits 101 and 103. The land constituted portions of the entire land described in Exhibits 102 and 103. The land described in Exhibit 107 was likewise all included within the leases, as was the land described in Exhibits 105 and 106.

II. Records of the Geological Survey Branch.

Harold C. Scoville, a petroleum engineer attached to the United States Geological Survey Branch of the Department of the Interior, had access to certain documents. His office maintained records on all wells drilled under federal leases in the State of Utah. Royalties on produced oil with respect to government leases, were paid to the United States through Scoville's office.

Scoville testified that he had searched the records to ascertain if any royalty had been paid on any oil produced on a federal lease by an operator known as Monte G. Mason, and he found that no royalties were paid in the Cane Creek Field on any leases; that he had checked the leases and they were Utah 0496, Salt Lake City 064948, Salt Lake City 064949, Salt Lake City 064950 and Salt Lake City 026375. The witness further testified that *their records did not show any producing well was ever completed on any of the described leases in the Cane Creek Field.*

O. Aspects of the Leases and Operating Agreements:

The record indicates that the leases denoted People's Exhibits 101 and 103 required in effect that the les-

sees do certain work, pay certain royalties, and pay a nominal yearly rental per acre (*i.e.*, between 50 cents and a dollar); that there was a recital in the operating agreement denoted People's Exhibit Number 105 (which together with Exhibit 106 related to land described in Exhibits 101 and 103) to the effect that no cash consideration was paid by appellant Jeanne Mason for the agreement, but rather that the obligation to perform the drilling requirements and pay the rentals constituted the consideration; and that the same applied as to the operating agreement denoted People's Exhibit 106. There was defense testimony that as to one of the assignments of operating agreement Jeanne Mason received 2,800,000 shares of stock valued at one dollar per share by M.G.M. The record further discloses that People's Exhibit 110 included a partial reassignment by M.G.M. to appellant Jeanne Mason of drilling rights originally assigned to this company, reciting a consideration of $10.

There was also defense testimony reflecting that the transfers of shares of stock received by the various prosecution witnesses were charged against shares of Jeanne Mason's stock; and that the consideration she had given for the stock certificates which were issued to her in the different companies was "the oil leases on the property" (*i.e.*, assignments of operating agreements for which agreements, no cash consideration was paid). The record also indicates that a number of the certificates bore no dates for her endorsements.

P. Bank Records:

Harry T. Steffens, Assistant Vice-President of the United States Bank of Grand Junction, Colorado, had

with him documents pertaining to the Robert L. Parent, Trustee accounts at his bank. He identified People's Exhibits 63 and 64 (*i.e.*, involved in the McBain transactions) as being checks which had been cashed at his bank. People's Exhibit 65 (also so involved) was another check which had cleared through his bank and had been deposited. People's Exhibit Number 72 constituted a record of the Robert L. Parent, Trustee account from the period January 3, 1955 through November 21, 1955. Another exhibit reflected signature cards for that account. People's Exhibit Number 74 constituted a deposit slip for the check denoted People's Exhibit 65 (in the amount of $27,300, drawn by McBain and dated March 8, 1955) said check having been deposited March 11, 1955. It was indicated that People's Exhibits 63 and 64 were cashed on March 10.

People's Exhibit 75 constituted a money order drawn on Steffens' bank which was deposited in the First National Bank of Grand Junction, Colorado. It was made to Glenn and Parent, C. D. Moslander, Trustee. Steffens identified a group of other money orders issued by his bank, these being People's Exhibits 76 through 88. He noted that one of them was endorsed for deposit only to the account of Modco, Inc. People's Exhibits 81 through 88 comprised money orders issued by his bank, made to a certain payee and negotiated for payment generally through the First National Bank of Moab, Utah. People's Exhibits 89 through 91 comprised deposit slips showing deposits made at Steffens' bank.

It was stipulated that the money orders denoted People's Exhibits 76 through 78; 80 through 84; and

87, bore the signature of Monte Mason, that is, M. G. Mason, on the reverse side of each one.

A handwriting expert who had made a comparison of the signature of C. D. Moslander, Jr. on People's Exhibit Number 73 (signature card) was of the opinion that it was signed by the same person who wrote that name as an endorsement on the reverse side of People's Exhibit 75 (money order). In the expert's opinion, the name Robert L. Parent, written on People's Exhibit 73, was written by the same person who wrote the same name as an endorsement on the reverse side of People's Exhibit 75.

The record discloses that a considerable amount of money from the Parent Trustee account (some of it about the time stock certificates were purchased, and particularly about the time the checks denoted People's Exhibits 63 through 65 were received), was endorsed over to Modco, Inc., through the use of the money orders, in some instances Jeanne Mason's endorsement or that of appellant Monte Mason appearing thereon.

Q. Evidence as to Handwriting:

It was stipulated that Monte Mason's signature appeared on the following documents: People's Exhibits 6 and 7 (stock certificates for Mr. Teter); People's Exhibits 8 and 9 (stock certificates for Mr. Kirkland); People's Exhibits 11 and 12 (stock certificates for Mr. Mayer); People's Exhibits 16 through 21 (stock certificates for Mr. Marlin); People's Exhibits 24 through 26, and 28 (stock certificates for Mr. Yoder); People's Exhibits 31 through 33, and 35 (stock certificates for Mr. Mueller); People's Exhibits 37 and 38 (stock certificates for Mr. Tubbs); People's Exhibits 42 through

44 (stock certificates for Mr. McKnight); People's Exhibit 46 (a check from Mr. McKnight); and People's Exhibit 2-A (Minutes of Americol Corporation meeting of board of directors).

A handwriting expert compared exemplars of the appellants' writing with writing appearing on a number of documents. It was his opinion that Jeanne Mason's signature appeared on the following documents: People's Exhibit 110 (assignment of operating agreement from appellant Jeanne Mason to Modco, Inc.); People's Exhibit 109 (assignment of operating agreement from Jeanne Mason to M.G.M.); and on People's Exhibit 108 (assignment of operating agreement from Jeanne Mason to Americol). Monte Mason's signature also appeared on Exhibits 108 and 109. Jeanne Mason's signature appeared on People's Exhibit 107 (assignment of operating agreement from Jeanne Mason to Americol), and on People's Exhibits 105 and 106 (operating agreements between Jeanne Mason and Cane Creek Oil Company); Monte Mason's signature also appeared on People's Exhibits 107 and 98 and 99 (stock certificates for Dr. Pearman), and on Exhibits 94 and 95 (stock certificates for Mr. Shemley); that Jeanne Mason's signature may have been the one appearing as first endorser on the reverse side of People's Exhibit 88 (a money order issued by the United States Bank of Grand Junction, as were People's Exhibits 76 through 87) that Monte Mason's signature appeared as first endorser on the reverse side of People's Exhibit 80; that his signature appeared as first endorser on the reverse sides of People's Exhibits 81 through 84; and on the reverse side of People's Exhibits 80, and 76 through 78; that his signature appeared on the lower right-hand corners

of People's Exhibits 60, 62, and 66 through 69 (stock certificates for McBain); that Jeanne Mason's signature appeared on People's Exhibits 57 (mortgage of chattels to McBain), 58 (promissory note for McBain), and 59 (letter of agreement as to McBain).

R. Aspects of the Defense:

Neither Monte Mason nor Jeanne Mason testified. Duane Randall testified, among other things, that he was a consulting geologist and was familiar with the Cane Creek structure; that he was vice-president of Modco, Inc., and that he was not a paid employee but had an arrangement whereby he would gain stock in Modco, M.G.M. and Americol. He identified various documents pertaining to tests of wells and records of M.G.M.; he testified that the Halliburton Company which made the tests was an independent service company and that the chart indicated excellent formation pressures; that a drill stem test on M.G.M. well No. 2, taken by Halliburton in March, 1955, disclosed that the test tool was open for 73 hours and that oil flowed through it for about 71 hours. He related that he had examined logs of wells within 15 miles of the area and at further distances; that he had compared the showings made on the logs with the showings of M.G.M. No. 2 and found that the logs correlated; and that various limes in the system were extensive.

He related further that he arrived in Moab shortly after Thanksgiving, 1955, and saw the three wells; that oil came out of the Americol well and he bailed some out; that at about the same time he saw oil coming out of the M.G.M. No. 1 well and obtained a sample; that at times it flowed as such as half a cellarfull; that he saw the Modco well and that it was more or

less "on production" ever since he was there. By this he meant that one could produce oil from it, that is, that on occasion he had opened the valve and let the well flow itself. He testified to his having found that magnesium chloride water had entered some of the wells and stopped the porosity; that M.G.M. had hired the Dow Chemical Company to solve the problem, and that Dow had added some chemicals to the zone; that this problem faced the Modco well but that it was solved by placing the casing to a depth of 6,600 feet.

Also, he testified that he had examined a number of reports and records and that in his opinion there was a minimum of 4,000 acres of underground porus pay zone on the crest and down the flanks of the Cane Creek Anticline; that the M.G.M., Americol, and Modco wells were approximately in the center thereof; and that in all probability there were about 200,000,000 barrels of oil recoverable by primary recovery, although this was a guess.

He acknowledged on cross-examination that no producing well had ever been reported on the leased lands; that none of the wells under consideration had been put on commercial production (*i.e.*, selling day by day over a period of time). He testified that according to his terminology "production" meant any oil that came from a formation.

Another defense witness, James Hudson, testified, among other things, that he had been a pilot for the appellants; that about the spring of 1955 he saw McKnight give some checks to Monte Mason and heard him say that he would consider them a loan to the company, and that Mason should do his job up there and pay it back whenever he had the money; that he did

not know if the money was ever repaid; and, finally, that he had seen oil flowing from the wells in Utah.

William O. Gray, who among other things was an officer in Americol (*i.e.*, president), M.G.M. (*i.e.*, vice-president), and Modco (secretary and treasurer), related that he had examined numerous exhibits, and he indicated that the transfers of stock received by different prosecution witnesses were charged against shares of Jeanne Mason's stock; also, that the consideration she had given for her stock was "the oil leases on the property."

Severin Sorensen testified that he was an officer of M.G.M.; that he had been vice-president and was now secretary; that 2,800,000 shares of M.G.M. had been issued to Jeanne Mason for an operating agreement and that the agreement had been valued by the corporation at $2,800,000.

He related that he met one Houston Slate in a meeting at the residence of Monte Mason approximately in the fall of 1952 when Ralph Hunt and Dr. Ross Huntley were present; that a film was shown by Monte Mason; that Mason had maps of the Moab well site areas and also had some oil; that Mason did not say there were 9,800 barrels of oil coming out of the well each day; that Mason said they had made a test and there were 9,800 barrels per day flowing through a ten sixty-fourth's opening; that Mason said this was the rate of flow; that Mason did not say the oil sold for $4.10 a barrel at the well, but that it would bring about that much at the refinery; that Mason did not say they were realizing $40,000 a day from the output of this well; that Mason did not say they expected to spud in a second well within a few days; that he never heard

Mason say that he had turned down money from anyone because of their looks; that Mason did not say the stock would have to be transferred in Las Vegas because he had to get around the corporate securities act; that Mason did say, however, that the stock would have to be transferred at Las Vegas and that one Rulin Earlin was the transfer agent; and that Jeanne Mason was moving in and out at this meeting.

Appellants' first contention is that "The indictment fails to set forth acts constituting a public offense with reasonable notice and thus providing opportunity to prepare and present a defense, in violation of procedural due process of law."

The initial attack is directed to Count I of the indictment. Count I is set forth in part in the footnote.[22]

Section 952 of the Penal Code provides:

"In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made

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[22]"The said defendants are accused by the Grand Jury . . . of the crime of Criminal Conspiracy to cheat and defraud by criminal means and to obtain money and property by false pretenses and by false promises with fraudulent intent not to perform such promises, in violation of Section 182, Subdivision 4, Penal Code of California, to commit Grand Theft, in violation of Section 487, Subdivision 1, Penal Code of California, and to violate the Corporate Securities Law, in violation of Sections 25009, Subdivision 'a,' and 26104, Subdivision 'a' of the Corporations Code of California, a felony, committed prior to the finding of this indictment and commencing on or about October, 1948, and continuing up to the finding of this indictment, as follows:

"That between said dates and prior to the finding of this indictment, at and in the County of Los Angeles, State of California, and in other counties of California and in the States of Utah, Colorado, Nevada and elsewhere, and within the jurisdiction of this court, the said defendant, [sic], MONTE G. MASON,

in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. *In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another.*" (Emphasis added.)

These provisions are permissible and directory, and not mandatory. As stated in People v. Price, 46 Cal. App. 2d 59 at page 61 [115 P. 2d 225]:

". . . They do not direct what must be alleged in a pleading but indicate rather broadly the form a pleading may follow."

The use of the words "give the accused notice of the offense of which he is accused" constitutes a clear manifestation of legislative intent that even less than a pleading may follow."

The use of the words "give the accused notice of the offense of which he is accused" constitutes a clear man-

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JEANNE R. MASON and CLYDE D. MOSLANDER, JR., together with one ROBERT S. ROSS, ROBERT L. PARENT, BOBB B. GLENN, DARRELL REARDON, RALPH H. HUNT, RALPH J. BROWN, JAMES P. CUNNINGHAM, MARTHA A. YODER HUNT and divers other persons too numerous to mention, and all of whose names are to the Grand Jury unknown, did wilfully, unlawfully, feloniously and knowingly conspire, combine, confederate and agree together and with each other, and with the other persons named herein, and with divers other persons too numerous to mention herein and all of whose names are to the Grand Jury unknown, that they would cheat and defraud, by criminal means and to obtain money and property by false pretenses and by false promises with fraudulent intent not to perform such promises, to commit Grand Theft and to violate the Corporate Securities Law of the State of California, as follows:

"(18 Overt Acts Alleged—See footnote No. 4, *supra.*)"

ifestation of legislative intent that even less than a pleading of the offense in the language of the statute would be sufficient *so long as the accused is given the aforementioned notice.*

It is stated by Judge Fricke in the fifth edition of "California Criminal Procedure" at pages 102-104:

" 'The sufficiency of an indictment or information is not to be tested by the rules of the common law nor by the rules which existed prior to the amendments of 1927 and 1929 of our statutes relating to the pleading in criminal cases. The true rule can be determined only by a consideration of all the statutes affecting the subject as they exist since these amendments. *The purpose of an indictment or information is to inform the accused of the charge which he must meet at the trial.* At common law, where this information came solely from the indictment, much particularity was required . . . *as a part of the accusatory procedure the law now provides that in every case the accused is entitled to a copy of the testimony given before the grand jury* or the committing magistrate as the case may be (§§870, 925, Penal Code) *and he is today better informed as to the case he must meet than was an accused under the detailed form of pleading required at common law. By section 959 of the Penal Code as amended in 1927* (Stats. 1927, p. 1041) *we have the statutory provision that an information, indictment or complaint is sufficient if it can be understood therefrom that it is entitled in a court having authority to receive it; that the defendant is named, . . .; that the offense is one of which the court has jurisdiction and that the offense was committed prior to the filing of the information.* The former requirements of subdivi-

sions 6 and 7 of section 959, that the act or omission charged must be clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended and to enable the court to pronounce judgment upon conviction were repealed by the 1927 amendment and are no longer a part of that section. Insofar as section 950 of the Penal Code seems to conflict with the rule laid down by section 959, as amended, the latter section must control in view of the evident intent of the legislature to remove the former requirements of subdivisions 6 and 7 by their repeal. Section 952, which formerly required the pleading to set forth the particular circumstances of the offense charged, as amended (in 1927), declares that it (the indictment or information) shall be sufficient if it be "in any words sufficient to give the accused notice of the offense of which he is accused." There, in a nutshell, is stated the principle of pleading a criminal offense—the accused is entitled to notice of the offense of which he is charged but not to the particular circumstances thereof, such detail being furnished him by the transcript of the testimony upon which the indictment or information is founded.' (People v. Beesly, 119 Cal. App. 82, 84 [6 P. 2d 114, 970]; quoted and followed in People v. Gilbert, 26 Cal. App. 2d 1 [78 P. 2d 770]; People v. Yant, 26 Cal. App. 2d 725 [80 P. 2d 506]; People v. Pierce, 14 Cal. 2d 639 [96 P. 2d 784]; People v. Curtis, 36 Cal. App. 2d 306 [98 P. 2d 228]; People v. Corica, 55 Cal. App. 2d 130 [130 P. 2d 164]; People v. Jones, 61 Cal. App. 2d 608 [143 P. 2d 726]; People v. Gordon, 71 Cal. App. 2d 606 [163 P. 2d 110]; People v. Randazzo, 48

Cal. 2d 484 [310 P. 2d 413]; 'Notice of the particular circumstances of the offense is given not by detailed pleadings but by the transcript of the evidence before the committing magistrate or the grand jury' (People v. Roberts, 40 Cal. 2d 483 [254 P. 2d 501]). '. . .' Section 952 is constitutional. (People v. Ilderton, 14 Cal. App. 2d 647 [58 P. 2d 986]) . . ." (Emphasis added.)

A similar contention to that being made by appellants in this case, was made in People v. Gordon, 71 Cal. App. 2d 606 [163 P. 2d 110]. In the Gordon case, the first count of the indictment charged a conspiracy of the defendants. As appears at page 610 of the opinion:

". . . [T]hat they 'confederated and agreed together and with each other, and with divers other persons to the grand jury unknown, that they would cheat and defraud by criminal means, and obtain money and property by false pretenses and false promises, with fraudulent intent not to perform such promises, and to commit grand theft.' Following such charge the indictment sets forth 28 overt acts whereby it is alleged that one or the other or both of the defendants took specified sums of money from the several persons named in the declarations of the overt acts."

The court held that the count charging the conspiracy "is not wanting in any of the essentials of a valid accusation."

In the case of People v. Gilliland, 39 Cal. App. 2d 250 [103 P. 2d 179] an attack was made upon Count I of an indictment charging conspiracy to violate the corporate securities law. The attack was made by general and special demurrers. This Court specifically up-

held the validity of the indictment. Although the opinion does not set forth the indictment, the context of the aforementioned count, taken from the original record, is set forth in footnote form.[23]

There is no merit to appellants' contention that the indictment is defective. The indictment itself need not allege the victim.

Appellants next contend that Count I is defective in that it fails to allege that the securities sold without a permit required a permit (*i.e.*, that the People must negative in the indictment the exceptions to the Corporate Securities Law).

Where an exception is descriptive of or an element of the offense charged, it must be negatived in the pleading (People v. Priestley, 17 Cal. App. 171 [118 P. 965]). However, where the exceptions are not a

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[23] "COUNT I: The said . . . (defendants) are accused by the Grand Jury . . . by this Indictment, of the crime of CONSPIRACY TO VIOLATE THE CORPORATE SECURITIES ACT and GRAND THEFT, felonies, committed prior to the finding of this Indictment, as follows:

"That continuously . . . from about the 1st of November, 1935, to about the time just prior to the finding of this Indictment, in the County of Los Angeles . . . and within the jurisdiction of this court, and prior to the finding of this Indictment, the said defendants, . . . knowingly, willfully, unlawfully and feloniously conspired, combined, confederated and agreed together, and with each other, and with diverse other persons to the Grand Jury unknown, that they would issue and sell, and cause to be issued and sold, for value, shares of the capital stock of 'Dr. W. B. Mayo Laboratories, Inc.,' a corporation, . . ., without first having applied for and secured from the Commission of Corporations of the State of California, a permit authorizing them so to do."

NOTE: Some five overt acts were then alleged.

part of the statute defining the offense and constitute a matter of defense, the pleading is sufficient without any allegation showing that the exception does not exist. Four cases dealing with the sale of corporate securities without a permit see People v. Murphy, 17 Cal. App. 2d 575, 587 [62 P. 2d 592]; People v. Ratliff, 131 Cal. App. 763 [22 P. 2d 245]; People v. Main, 75 Cal. App. 471 [242 P. 1078]. No reference to the defensory exceptions need be made in charging the offense.

Appellants further assert that Count I is defective in that it fails to allege that there was any specific intent to deprive the owners permanently of property under Penal Code, section 182, subdivision 4.

Count I alleged that the appellants conspired ". . . to cheat and defraud by criminal means and to obtain money and property by false pretenses and by false promises with fraudulent intent not to perform such promises, in violation of Section 182, Subdivision 4, Penal Code of California . . ." The language of the indictment, in this respect is similar to the indictment in People v. Gordon, *supra*, 71 Cal. App. 2d 606, 610, where the indictment was held to be valid.

As to Counts V, VII, VIII, IX, XI, XV, and XVI (*i.e.*, substantive counts in the indictment dealing with violation of the Corporate Securities Law), appellants again assert that it was incumbent upon the People to negative in the indictment the exceptions to the Corporate Securities Law.

The aforementioned substantive counts set forth in effect that the defendants unlawfully and knowingly sold securities for specified amounts on specified dates to specified individuals and that these securities were shares of stock in specified corporations organized for

profit, and that the defendants so acted without first having applied for and secured a permit from the Commissioner of Corporations in violation of Corporations Code, section 26104, subdivision (a). As indicated above, no reference to the defensory exceptions need be made in charging the offense (People v. Murphy, *supra*, 17 Cal. App. 2d 575; People v. Ratliff, *supra*, 131 Cal. App. 763; People v. Main, *supra*, 75 Cal. App. 471; see People v. Sears, 138 Cal. App. 2d 773, 775-776 [292 P. 2d 663]).

Appellants also assert that Count XIV is defective in that it fails to allege an intent to deprive the owner permanently of his property. In Count XIV the appellants were charged with the crime of grand theft in violation of Penal Code, section 487, subdivision 1, in that they unlawfully took a specified sum of money which was the personal property of a specified individual. Penal Code, section 952, specifically provides in pertinent part that:

". . . In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another."

It is settled law in this state that an allegation of an unlawful taking as in the case at bar is sufficient. (People v. Ashley, 42 Cal. 2d 246, 258 [267 P. 2d 271]; People v. Corenevsky, 124 Cal. App. 2d 19, 23 [267 P. 2d 1048].)

For the foregoing and other reasons, the indictment clearly states acts constituting a public offense.

Appellants' second contention is that the trial court failed to rule on their motion in arrest of judgment and as a consequence, a new trial is required.

Following the return of the verdicts, defense counsel orally stated that he was making a motion for a new trial and in arrest of judgment. Thereafter, defense counsel filed a "Memorandum of Points and Authorities in Support of Motion for New Trial and Motion in Arrest of Judgment." Paragraph IX of the "Memorandum" provides:

"IX

"The indictment is defective and deficient in the particulars and on the grounds heretofore urged before this Court, and the Court lacks jurisdiction over the offenses charged."

Such contentions are embraced by a motion in arrest of judgment (Pen. Code, §§1004, 1185).

The reporter's transcript discloses the following:

"The Court: All right. How do you want to proceed, on the motion for new trial first?

"Mr. Strong: I would think so, . . .

"The Court: The record will show I have read all the probation reports in both cases; also the memorandum of points and authorities on motion for new trial, and also motion to strike portions of the probation report and for referral of the matters to the Probation Officer.

"We will take them in the order of motion for new trial and the matter of re-referral, and also the matter of probation and sentence, we will take that first if we get that far, and also resetting.

". . . . . .

". . . . . .

"Mr. Strong: In view of the fact that you have received a written memorandum that I have filed in support of my oral argument, your Honor, I don't see any point in my going into the rest of the points because I have made them and argued specifically and generally and you have made some decision on it but your Honor, I feel as to all of the evidence here and all of the things that have been mentioned, that a new trial should be granted as to each defendant on all of the counts.

"The Court: *Well, Counsel, I have considered all of your points and authorities and many of these things I have considered during the trial and there were rulings made during the course of the trial.*

"*The motion will be denied.* (Emphasis added.)

". . . . . .

". . . . . .

"The Court: . . .

". . . Is there any legal cause why judgment and sentence should not now be pronounced in this matter at this time?

"Mr. Strong: I have already indicated, your Honor, in the referral motion and I think that is the legal cause. . . .

"The Court: Is there anything further?

"Mr. Strong: No.

"The Court: There being no legal cause why judgment and sentence should not now be pronounced in this matter, . . ."

The Court then pronounced sentence. From the above it seems clear that the record is consistent with the trial court having passed upon and having denied

the motion *(i.e.,* both for a new trial and in arrest of judgment). As stated in People v. Wissenfeld, 36 Cal. 2d 758 at page 767 [227 P. 2d 833]:

". . . 'all intendments and presumptions not contradicted by or inconsistent with the record are in favor of the regularity of the proceedings' in the court below. . . ."

Mr. Parsons, the present counsel for appellants, argues in his brief that when the trial court asked if there was any legal cause why judgment should not be pronounced, that trial counsel's statement, "I have already indicated, your Honor, in the referral motion and I think that is the legal cause . . ." was with reference to the motion in arrest of judgment. The record clearly does not support appellants' contention. The so-called "referral motion" was with reference to a re-referral of the probation report to the probation department.

Appellants' third contention is directed to the purported misconduct on the part of the district attorney during closing argument.

It is stated in People v. Lyons, 50 Cal. 2d 245 at page 262 [324 P. 2d 556]:

". . . Whether a prosecutor has been guilty of prejudicial misconduct must be determined in the light of the particular factual situation involved. Previous authority is of little help."

Appellants assert prejudicial misconduct in that the prosecutor accused defense counsel of the most malicious, vicious, deliberate attempts to mislead the jury, of misstating the evidence and misquoting the prosecuting attorney's argument; and also that the prosecutor

misquoted defense counsel. The reporter's transcript discloses the following:

"Mr. Mayerson: May it please the Court, and ladies and gentlemen of the jury, there is one thing that Mr. Strong and I agree upon, and that is that the burden of proving any one guilty of the crimes charged against him must be proved by the People beyond a reasonable doubt; and it is because we have that burden that I have this opportunity to make what is called the closing argument in summation to you. . . .

"I have listened to Mr. Mason—excuse me—Mr. Strong—to Mr. Strong, and I think that I am as aware as you of his eloquence and his impassioned plea on behalf of his clients, but, ladies and gentlemen, passion and eloquence are not substitutes for accuracy.

"I propose in this opportunity given to me to answer Mr. Strong to show you what in my experience has been the most malicious, vicious, deliberate attempts on the part of a lawyer in a closing argument to mislead the jury in misstating the evidence, in misquoting my argument that I have ever had the displeasure of hearing.

"But, before I begin with that, if I may be permitted a moment to tell a story that I like, it comes to my mind because of a remark that Mr. Strong made. He said towards the end of his remarks that perhaps we have shown a technical violation of an unclear law.

"Mr. Strong: I do not recall making any such admission, your Honor.

"The Court: No. There was no statement made like that in those words that I recall.

"Mr. Mayerson: Well, your Honor—

"The Court: *The jury will disregard that statement.* (Emphasis added.)

"Mr. Mayerson: Well, as I understood the remarks,—

"The Court: Well, now, you may have inferred many things, but you made that as a quote. It is not a quote of any such fact that I am aware of.

"Mr. Mayerson: Well, this has happened so short a time ago that I am sure you remember that Mr. Strong spoke of the law, and he said, 'It is unclear, you could not find anybody guilty of a technical violation.'

"Now, if that is much different from what I said before, ladies and gentlemen, I ask is Mr. Strong suggesting to you that if the requirement for a permit before the sale of a stock is permitted in this state is a technical law, and if you find that the defendants did violate the law that you must find them not guilt (sic) because the law is unclear and, as he said, you would not know today if you could go out and sell your stock.

"That is the point I am making. Is Mr. Strong asking you to violate your oath to apply the law coldly and dispassionately to every person whether it be a technical law or not?

"Well, this is a technical law. I submit the evidence here has proved beyond a reasonable doubt that it was violated.

"But the story that I wanted to tell you about I think is a whole lot more amusing than Mr. Strong's suggestion that if you feel this is merely a technical law and that it is unclear so that you would not know

what to do with your own stock, you should ignore the law or find the defendants not guilty merely because it is a technical law."

It is to be noted from the portion of the reporter's transcript reproduced above, that no objection was interposed by counsel to Mayerson's remarks to the effect that defense counsel made a malicious, vicious, etc. attempt to mislead the jury. Further, when Strong (defense counsel) took exception to the purported admission by him of a technical violation of the law, the trial judge agreed with Strong and expressly admonished the jury to "disregard that statement." Furthermore, Strong in his closing argument to the jury did in fact make reference to the law as being "unclear and technical."

As appears from the reporter's transcript, during Strong's closing argument:

"Mr. Strong: . . .

"Let me tell you something. If the law is so complicated and confusing about all that, you should not convict in any instance. If you are going to convict somebody of a major crime, the law ought to be clear; and the law ought to tell you precisely so you can do what you can do and what you cannot do.

". . . 'It gets technical. People get prosecuted because of technicalities. I would like to know about these technicalities.'

"If the law is that indefinite, how can you conclude that whatever the proof is proves beyond a reasonable doubt that there was a definite violation, that there was an understandable violation, that there was something that somebody could really grasp at and clearly

understand? Not only is the proof confused here, but when you hear what the law is you try to figure it out, too. See if you do not come up with different versions the more you talk about it and the more you discuss it. That is a basis for a conviction of a felony?"

A circumstance militating against any claimed prejudice is that remarks of a similar nature have been exchanged. During defense counsel's closing argument it was intimated and stated among other things, that the prosecuting attorney had presented matter which may have been ". . . deliberately calculated to confuse people"; has insulted ". . . the intelligence of anybody who sees and listens to the evidence here"; that the prosecution is ". . . trying to befuddle you in any way they can and to confuse you any way they can . . ."; that the prosecution was guilty of "extremely bad faith"; that the prosecution made a ". . . deliberate and conceived effort to mislead you to take your mind off the issues in this case, . . ." There was no prejudicial misconduct on the part of the prosecutor under the circumstances.

Next, appellants complain of the prosecuting attorney's reference in his closing argument to a count which had been dismissed. Defense counsel had criticized the prosecutor for his failure to make an opening statement. The reporter's transcript discloses that the following took place during the prosecution's closing argument:

"Now, let me start at the beginning of Mr. Strong's argument. He said that there is so much confusion in the evidence and in my argument or in the fact I did

not make an opening statement. Now, I wonder what he wanted in an opening statement? That I might say, 'We anticipate showing that stock was sold to William Teter without a permit by the defendants, or that stock was sold to Mr. Kirkland without a permit, or to Mr. Yoder without a permit.' I might have done that, and I might have come to the area of this indictment where there were—Count 17 I might have said that, *'We will show that stock was sold to Dr. Frank Hombach without a permit.'* (Emphasis added.)

"Mr. Strong: *That is assigned as prejudicial misconduct.* (Emphasis added.)

"The Court: *The jury will disregard the statement made by counsel respecting the sale to one Dr. Frank Hombach.* (Emphasis added.)

Mr. Mayerson: *I am merely,* ladies and gentlemen, *pointing out to you that I may have referred to a count in this indictment on which we would present no evidence,* and then Mr. Strong would stand up and say, 'Ah, you see, he promised to show this, but he did not show you that,' and, therefore, I would have been a liar in my opening statement . . ." (Emphasis added.)

From the transcript, it appears clear that the trial judge ordered the jury to disregard the statement relative to Dr. Hombach, and further the prosecuting attorney indicated that no evidence had been presented relative to the count in question. Earlier in the trial, the prosecutor had stated that no evidence was being offered respecting Count XVII and the court granted his motion to dismiss, instructing the jury that the count was no longer before it for its consideration. In view of the court's admonitions to the jury and of the cir-

cumstances that the prosecution was merely referring to the matter by way of illustration to explain why (in response to defense counsel's challenge) he had not made an opening statement, and was not referring to the matter as having been proved, it appears clear that the remark (which was stricken) did not constitute an argument of guilt as to the dismissed count and that no prejudice appears.

Appellants next complain of the prosecuting attorney's statement in his closing argument wherein he submitted that a witness had been coached by reason of the wording of an objection interposed while the witness was under cross-examination by the People. The transcript provides in pertinent part as follows:

"Now, Mr. Strong originally asked the witness about stamps. On cross examination I asked—I was asking Mr. Gray some questions about the certificates, and I came upon the certificate that is made out to Clyde Moslander, Jr., which is Exhibit C-6, and I asked the question, 'This certificate is not endorsed, is it?'

" 'That is correct.'

". . . .

" 'Q. It has a word "cancelled" stamped on it.

" 'A. That is right.

" 'Q. There is no Government stamps on it, is there?'

"Mr. Strong has asked about government stamps. On this one I say, 'There is no Government Stamps on it, is there?'

"Mr. Strong objects that it is irrelevant and immaterial. Now, you can object any time you want to, any lawyer is entitled to and, if he believes that it is a

proper objection, it is his duty to; but you make the objection.

"Mr. Strong adds, '*As counsel knows, you can put stamps on the certificates or the stubs.*' (Emphasis added.)

"Now, I asked Mr. Gray, 'Do you know, Mr. Gray, whether or not there were any stubs put on any—any stamps put on the stub to Certificate Number 974?

"'A. Personally I don't know on that particular certificate, but I have seen stamps on the stubs.'

"*I submit,* ladies and gentlemen, *that that is coaching the witness right in front of your eyes. By Mr. Strong making the objection, saying that I know the fact, the witness knows what answer he is to give. That is what I see in this record,* ladies and gentlemen.' (Emphasis added.)

"Mr. Strong: I think, your Honor, I am entitled to protest when counsel makes statements like that, and I would like to do it for the record. I think it is outrageous, your Honor, just outrageous. . . ."

As prosecuting attorney has a wide range in which to state his views as to what the evidence shows and the conclusions to be drawn therefrom (People v. Burwell, 44 Cal. 2d 16, 39-40 [279 P. 2d 744]), and he may comment as to the manner in which a witness testifies. (People v. Rossi, 37 Cal. App. 778, 782-783 [174 P. 916].) As stated in Judge Fricke's work on Criminal Procedure at page 311:

"Arguments to the jury must be based upon the evidence adduced at the trial, the absence or lack of evidence and the legitimate inferences and conclusions to be drawn therefrom and *may include a discussion of the*

credibility and reliability of testimony and evidence." (Emphasis added.)

In conjunction with the matter above set forth, appellants complain of the prosecutor's statement in his closing argument to the effect that defense witnesses had testified to a pattern of things which could not be true for the purpose of creating a false defense. An objection was made and the court directed the prosecutor to proceed. In accordance with the authorities heretofore cited, no prejudice appears . . .

During opening argument, the prosecuting attorney had alluded to a number of documents presented on behalf of appellants, then to one of the defenses to a charge of violating the Corporate Securities Law, and then to Gray's testimony relative to his sale of stock to certain individuals. The transcript discloses the following:

"Mr. Strong: I want to object, your Honor, because the documents have nothing to do with the crime involved here and your Honor expressly limited that to impeachment purposes.

"Mr. Mayerson: Exactly true. That is why I didn't understand why they came into evidence, and I can explain exactly what they mean.

"Mr. Strong: Counsel is saying this is part of the crime.

"Mr. Mayerson: I haven't finished my statement.

"The Court: You are explaining a violation of the Corporate Securities Act, the defense to it. I will sustain the objection.

"Mr. Mayerson: I am explaining it in the abstract, your Honor, not for these particular documents."

The gist of Mayerson's further argument was that Gray had been impeached. In the light of the fact that the court sustained the objection and the subsequent explanation by the prosecuting attorney and further that no objection was made to any further remarks, no prejudice appears.

Appellants' fourth contention is directed to the purported insufficiency of the evidence to support each count upon which they were convicted.

As indicated in People v. Mills, *supra*, 148 Cal. App. 2d 392, 404-405:

"The rule governing a court of review with respect to sufficiency of the evidence is stated in People v. Newland, 15 Cal. 2d 678, 681 [104 P. 2d 778]: 'The court on appeal "will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground" of insufficiency of the evidence, "it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below . . . We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict." If the circumstances reasonably justify the

verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury."

Insofar as the conspiracy is involved (*i.e.* Count I), what was said in People v. Steccone, 36 Cal. 2d 234 [223 P. 2d 17] is pertinent. It is stated at pages 237-238 as follows:

"As a general rule, a conspiracy can only be established by circumstancial evidence 'for, as the courts have said, it is not often that the direct fact of an unlawful design which is the essence of a conspiracy can be proved otherwise than by the establishment of independent facts, bearing more or less closely or remotely upon the common design (5 Cal. Jur. 521); and it is not necessary to show that the parties met and actually agreed to undertake the performance of the unlawful acts (citing authority), nor that they had previously arranged a detailed plan . . . for the execution of the conspiracy (citing authority).' (People v. Sampsell, 104 Cal. App. 431, 438-439 [286 P. 434].) However, before evidence of the acts and declarations of an alleged coconspirator is admissible against the other, the fact of the conspiracy must be proved. (Code Civ. Proc., §1870, subd. 6.) In recognizing the application of this rule of evidence in a criminal case, it was said in People v. Talbott, 65 Cal. App. 2d 654, at page 663 [151 P. 2d 317]: ": . . the fact of the conspiracy must be proved before the evidence of said acts or declarations may be considered. The issue, however, need be proved only to the extent of establishing prima facie evidence of the fact. . . .' " (See People v. Little,

41 Cal. App. 2d 797, 804 [107 P. 2d 634, 108 P. 2d 63].)

People v. Mills, *supra*, 148 Cal. App. 2d 392, 404, involved a charge of violating the Corporate Securities Law and a defense, similar to the one in the case at bar relative to the corporate security counts, was interposed. At page 406 of the Mills case, the court in quoting from People v. Goldstein, 136 Cal. App. 2d 778, 785 [289 P. 2d 581], stated:

"'It is true in a criminal case as in civil actions that a statement against interest made by a party *constitutes original and independent evidence of the facts so stated.*'" (Emphasis added.) It is also noted in the Mills case, *supra*, at page 407 that, ". . . an offer or an attempt to make a sale comes within the statutory definition of sale." (See Corp. Code, §25009, subd. (a).)

As to the crime of theft by false pretenses, the intent to defraud is a question of fact to be determined from all the facts and circumstances, and the inference of reliance on the part of the victim may be drawn from all the evidence. It is not even essential that the victim expressly testify that he was induced to part with his money or property by the fraudulent statements of the accused. (People v. Frankfort, 114 Cal. App. 2d 680, 697-699 [251 P. 2d 401].)

It cannot be said as a matter of law that the trier of fact was unwarranted in drawing an inference of awareness and tacit approval on the part of Jeanne Mason as to her husband's (Monte G. Mason) representations; the jury could reasonably infer that appellants were linked together in inducing the purchase of stock through extravagant representations and that the sales

of stock were not made for the account of the vendor, but rather for the benefit of the corporations, with the intent of evading the corporate securities law, thereby removing the transactions from the exception of Corporations Code, section 25152; the jury could infer that Cunningham played a vital role in appellants' enterprises, and that a conspiracy on the part of at least the three could reasonably be deduced and that appellants were associated in committing the substantive acts under consideration. From the evidence, it could be inferred that the stock was not being disposed of for the owner's own account, but rather that substantial portions of the proceeds were being applied for corporate uses.

There is additional evidence that the sales of stock did not come within the exception of Corporations Code, section 25152. The record reflects a number of instances in which funds for the purchase of stock were made payable or directed to Modco, Inc., or to Glenn and Parent or Robert Parent, Trustee, and in which money from the Parent, Trustee account was endorsed over to Modco through utilization of money orders which, in various instances, bore the endorsement of one appellant or the other.

The facts as heretofore set forth answer appellants' contention with reference to insufficiency of the evidence.

As one of their separate points under this contention, appellants argue that they could not properly have been convicted of conspiracy inasmuch as a husband and wife alone cannot be found guilty of conspiracy. (People v. Little, *supra*, 41 Cal. App. 2d 797 and cases cited therein.)

Count I of the indictment charged that appellants, together with several other specified persons and with a number of unknown persons, did ". . . wilfully . . . conspire, combine, confederate and agree together and with each other, and with the other persons named . . . and with diverse other persons too numerous to mention . . ." As heretofore shown, reasonable inferences or participation with appellants could be drawn relative to at least one of the other specified persons. Under these circumstances appellants were properly charged and found guilty. (People v. Richards, 67 Cal. 412, 418-419, 421-422 [7 Pac. 828, 56 Am. Rep. 716].) As stated in 11 Cal. Jur. 2d, Conspiracy, section 18, page 238:

"A husband and wife cannot be prosecuted for a criminal conspiracy of which they are the only members. *But this rule is not applicable where one or more other persons join with the husband and wife.*" (Emphasis added.)

Next, in relation to Count I, appellants contend that there is no substantial evidence to support the truth of the allegations in Overt Acts Number 13, 14, 17 or 18. The record clearly supports the allegations contained in the aforementioned "Overt Acts."

Appellants next assert that the evidence pertaining to Overt Acts 11 and 12 constituted admitted hearsay.

In his opening argument to the jury the prosecuting attorney conceded among other things that neither Overt Acts 11 nor 12 had been proved.

Next, it is contended that it was improper to have received evidence in support of overt acts which were beyond the statute of limitations, and that the Court

failed to instruct the jury that the evidence as to all Overt Acts except 13, 14, 17, and 18 was not to be considered.

In answer to the last mentioned contentions, the record discloses that during argument to the jury, the prosecuting attorney stated that none of the alleged overt acts had been proved except those numbered 1 through 4, 8, 13, 14, 17 and 18, which he discussed in some detail. He also called attention to the circumstance that the indictment was returned December 16, 1957, and that it was necessary for an overt act to have taken place within three years prior to the issuance of the indictment to comply with the statute of limitations. The trial court likewise instructed the jury[24] as to the necessity of finding the commission of an overt act within three years prior to the filing of the indictment and that such act must have been one of those expressly alleged in the indictment. As to the admissibility of evidence of overt acts which were outside the statute of limitations, what was stated in Bompensiero v. Superior Court, 44 Cal. 2d 178, 184-185 [281 P. 2d 250], is applicable:

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[24] "No agreement amounts to a conspiracy punishable in California unless in addition to entering into the unlawful agreement, *an overt act is done within the state* by one or more of the conspirators for the purpose of accomplishing the object of the agreement. The law requires that at least one of such overt acts be expressly alleged in the indictment and that in addition to proof of the criminal agreement between the parties, *at least one of the overt acts thus alleged must be proved to support a conviction for conspiracy*. But it is not necessary to the guilt of any particular defendant that he directly committed the overt act himself, if he was one of the conspirators when such an act was committed and *the overt act was committed within three years prior to the filing of this indictment*. (Emphasis added.)

"The term 'overt act,' as used in the law of conspiracy, means . . ."

"Proof that one of the overt acts in furtherance of the conspiracy occurred after the time before which the statute of limitations would be a bar is sufficient, and evidence of acts occurring before that time may be received to show the conspiracy. (People v. Gordon, 71 Cal. App. 2d 606, 629 [163 P. 2d 110].)"

It would appear that the jury was adequately informed as to what alleged overt acts the People were relying upon and as to the necessity of finding one of them to have been committed within the period of limitations.

The allegations of the overt acts upon which the People were relying satisfactorily met the requirements of Penal Code, section 184, that is, that some act be done within the state, aside from the agreement itself, to effect the object of the conspiracy by one of the parties thereto.

While evidence of out-of-state activities is relevant to show the object of a conspiracy (People v. Buffum, 40 Cal. 2d 709, 720 [256 P. 2d 317]; People v. Keller, 165 Cal. App. 2d 419, 427-428 [332 P. 2d 174]), the jury was adequately instructed that before it could find appellants guilty as to any count it must find beyond a reasonable doubt that the particular offense was committed in California. The instruction given was one required by the defendants (appellants).[25] Clearly, appellants' rights were protected.

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[25]"DEFENDANTS' INSTRUCTION NO. W-1:

"As to each and every count of the indictment if you decide there is sufficient proof beyond a reasonable doubt to convince you that the offense charged was committed, you must then decide beyond a reasonable doubt whether the offense was committed in California or in another state. If you do not find beyond a reasonable doubt that the offense was committed in California, you must find defendants not guilty of that particular offense."

Finally, appellants contend that Count I should fail because "the jury did not return any verdict showing which, if any, other alleged co-conspirator was found to be guilty of conspiracy."

Penal Code, sections 1150 and 1151, provide as follows:

"Section 1150. Authority to render general or special verdict; exception.

"*The jury must render a general verdict,* except that in a superior court, when they are in doubt as to the legal effect of the facts proved, they may, except upon a trial for libel, find a special verdict." (Emphasis added.)

"Section 1151. General verdict; forms.

"*A general verdict upon a plea of not guilty is either 'guilty' or 'not guilty,' which imports a conviction or acquittal of the offense charged in the accusatory pleadings . . .*" (Emphasis added.)

The jury returned verdicts of "guilty" in conformity with the requirements of the aforementioned Penal Code sections.

Appellants' next contention is directed to the purported insufficiency of the evidence to support the verdict of "guilty" as to Count XIV (*i.e.,* grand theft). See the "Angus C. McBain Transactions," *supra.*

Appellants' contention in substance is that McBain relied upon his own investigation of whether the well was in "production" and that the execution of the satisfaction was not the result of the representations made to him. From the circumstances, the jury could well infer that McBain was interested in investing in a commercially productive well; that neither he nor his friends

were especially experienced in oil matters, and that in executing the satisfaction of the chattel mortgage, he was motivated principally by the representation that the well was now in production. Production meaning "commercial production" and that his visit to the well site was not sufficient to put him on notice that the well was not in fact commercially productive.

Relative to the corporate securities counts, appellants contend that since the jury found appellants "not guilty" of Counts II and III, and could not arrive at a verdict as to Counts IV, X, XII, XIII, and XIX, that therefore, the evidence was insufficient to support the verdicts of "guilty" as to Counts V, VII, VIII, IX, XI, XV, and XVI.

It was stated in People v. Villa, 156 Cal. App. 2d 128 [318 P. 2d 828] at page 133 that:

". . . Section 954 of the Penal Code provides, in its last sentence: 'An acquittal of one or more counts shall not be deemed an acquittal of any other count.' Under this section, each count charging a separate and distinct offense must stand or fall on its own merits. The disposition of one count has no effect or bearing upon the other counts. This is so even though the respective verdicts in the various counts may be logically inconsistent. (People v. McCree, 128 Cal. App. 2d 196 [275 P. 2d 95]; People v. Codina, 30 Cal. 2d 356 [181 P. 2d 881]; People v. Ranney, 123 Cal. App. 403 [11 P. 2d 405].) . . . The jury was entitled, indeed obligated, to treat each count separately."

Appellants' fifth contention is that the trial court "lacked territorial jurisdiction." Appellants stated in their brief:

"To analyze these transactions, and not to repeat, the evidence plainly shows that Mason met some of these people in California; there were discussions here, but the people went to Utah; examined the property, and any stock that was purchased was done by forwarding the money to a firm of accountants in Colorado. It appears that the transactions were completed beyond the boundaries of California; that most of the activity between Mason and these people was conducted in Utah; therefore, we say that California could not prosecute for an offense, if any, which was committed beyond its boundaries." The appellants rely upon People v. Buffum, *supra,* 40 Cal. 2d 709, 715, which held that a conspiracy to commit a crime in another jurisdiction was not punishable in California. However, the court went on to state at page 720 that:

". . . an offense was completed when the agreement was followed by acts in this state (citation), . . . (and the acts outside of California) did not operate to nullify the acts which had already been done in California."

Appellants' contention is not supported by the record. The proscribed conduct took place as soon as appellant Monte Mason offered or attempted to sell stock in California. (Corp. Code, §25009, subd. (a).) As reflected by the record, such acts of sale as well as the acts culminating in the defrauding of McBain took place within the state, principally at meetings with prospective purchasers. Since the essential acts charged took place in California, the trial court had jurisdiction. (People v. Rankin, 169 Cal. App. 2d 150, 163-164 [337 P. 2d 182]; People v. Keller, *supra,* 165 Cal. App. 2d 419, 427-428.)

Appellants' sixth contention is divided into several points.

First, it is asserted that appellants were denied a fair trial in that the trial court erred in giving the instructions on conspiracy. This contention is predicated upon the assumption that there was no substantial evidence of a conspiracy. Having already determined that there was substantial evidence, this contention has been answered. (People v. Gardner, 147 Cal. App. 2d 530, 537 [305 P. 2d 614].)

Next, appellants contend that the instruction given by the trial court relative to a conspiracy between husband and wife was "confusing, and only tended to stress upon the jury that there was a conspiracy between the defendants, husband and wife."

The instruction which was given is as follows:

"Before you can find a conspiracy between the defendants here, it would be necessary for you to find that some third person named in the indictment as a co-conspirator, was also guilty of conspiring with the defendants in the manner charged against them in Count I."

The instruction which was offered by defendants (appellants) and refused is as follows: "A conspiracy cannot be formed where the sole parties to the agreement are husband and wife. (Citations.)" The instruction as given correctly reflects the law and appellants' contention is at best specious. However, see United States v. Dege (1960),—U. S.—[80 S. Ct.—, 4 L. Ed. 2d 1563] where the court held that a husband and wife do not fall outside the scope of a conspiracy statute. The court said in effect that criminal statutes

must not be construed by artificial and conventional rules and that we must "not allow ourselves to be obfiscated by medieval views regarding the legal status of woman and the common law's reflection of them." The court further stated that when it is considered that legitimate business enterprises between husband and wife are commonplace in our time "it would enthrone an unreality into a rule of law to suggest that man and wife are legally incapable of engaging in illicit enterprises and therefore, forsooth, do not engage in them."

Next, it is contended that the trial court erred in refusing to give their requested instruction as follows:

"Defendants' Instruction No. F-1:

"There is no illegality in the making of a loan by a stockholder to a corporation, even if the funds so loaned are the proceeds of a sale of the personally owned stock of said stockholder. (Citation.)"

The trial court did instruct the jury in accordance with the provisions of Corporations Code, section 25152, advising them that the provisions of the Corporate Securities Law did not apply to a sale of securities on behalf of the vendor who was not the issuer but was a bona fide owner of the securities and was disposing of his own property for his own account, and the sale was not made directly or indirectly for the benefit of the issuer. Clearly, the matter was thereby sufficiently covered. This also disposes of appellants' contention that the court erred in refusing to give the instruction to the effect that a bona fide owner of securities may dispose of his property for his own account.

Appellants then assert that the trial court erred with reference to instructions pertaining to acts outside the

state. They complain that the court refused to give the following two requested instructions:

"Defendants' Instruction No. I-1:

"A California court does not have jurisdiction to punish defendant for a crime committed outside of California. (Citations.)"

"Defendants' Instruction No. G-1:

"To constitute a conspiracy within subd. 1 of section 182 the crime which is the object of the conspiracy must be a crime to be committed within this state (People v. Buffum, 40 Cal. 2d 709 [256 P. 2d 317]). That means that in such a prosecution, the prosecutor must prove not only that the conspiracy was to commit the crime, but also that the crime was one agreed to be committed within this state."

As to the court's refusal to give the former instruction (*i.e.*, defendants' instruction No. I-1), the court gave an instruction concerning the out-of-state activities. (See footnote No. 25.) The instruction given by the court adequately covered the point.

As to the court's refusal to give the latter instruction (*i.e.*, defendant's instruction No. G-1, appellants assert that the court erroneously gave instead an instruction referring to Penal Code, section 778a, as follows:

"Whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of such intent, which culminates in the commission of a crime, either within or without this state such person is punishable for such crime in this state in the same manner as if the same had been committed entirely within this state.

"Section 778a, Penal Code."

In support of their contention, appellants cite People v. Buffum, *supra*, 40 Cal. 2d 709 and People v. Aragon, 154 Cal. App. 2d 646 [316 P. 2d 370]. As stated by the court in the Buffum case, *supra*, at page 716:

"Section 778a of the Penal Code should . . . be construed as applying only where the acts done within the state amounted (at least) to an attempt."

In view of the fact that the evidence in this case weighs heavily in favor of guilt by reason of the acts committed within this state which constituted completed offenses, and in view of the court's instruction as is set forth in the footnote and that the jury was instructed to consider all the instructions as a whole and each in light of the other, it would appear that the jury was not under any misapprehension in evaluating the evidence.

Appellants' sixth contention is directed to the purported misconduct by the prosecution *which occurred during the trial* (*i.e.*, as distinguished from those matters discussed under their third contention which were directed to purported misconduct during *closing argument*).

During cross-examination of Gray by the District Attorney, Strong, defense counsel, interposed an objection. The transcript discloses the following:

"Mr. Strong: Object to that as irrelevant and immaterial. As counsel knows you can put stamps on the certificates or the stubs.

". . .

"(Answer by Mr. Gray): Personally I don't know

on that particular certificate, but I have seen stamps on the stubs.

"Q. On the stubs? A. Yes.

"Q. Mr. Gray, do you take a cue for your answer from gestures made by Mr. Strong?

"Mr. Strong: *I cite that as misconduct.*

"The Court: Counsel, we will have no remarks like that *and the jury is to disregard it. Counsel has a right to make objections and the witness has a right to testify.*" (Emphasis added.)

This does not constitute the type of misconduct which is irreparable (*i.e.,* which cannot be cured by an admonition). The jury was instructed to disregard the remark and it is presumed that they followed the admonition.

Lastly, it is contended that the prosecuting attorney made an improper attack on a defense witness during rebuttal. During the examination of Mrs. Helm, the record discloses the following:

"A. (By Mr. Mayerson): Now, regarding that statement by Mr. Gray to you that the well that had come in was not on the Americol property but the next one would be drilled on the Americol property, did you, before you gave to Mr. Gray your check or checks, know that that well had not been drilled on the Americol property?

"Mr. Strong: Object to that, irrelevant, immaterial.

"The Witness: No.

"Mr. Strong: This is not proper impeachment, your Honor.

"The Court: *The answer may go out.*" (Emphasis added.)

Proceedings were then held at the bench out of the hearing of the jury at which time the trial court rejected the prosecuting attorney's offer of proof.

Since the trial court sustained the objection and one of the instructions given by the court concerned the matter that the jury must disregard matter stricken, this contention is devoid of merit.

The record before us shows that the appellants were given every protection which the law affords. They were fairly tried and convicted upon evidence which sustains the verdict.

For the reasons stated the purported appeal from the order denying the motion in arrest of judgment is dismissed and the order denying the motion for a new trial and the judgment are and each is affirmed.

Wood, *P. J.*, and Lillie, *J.*, concurred.